

THE c#
RIGHTS
OF THE
CLERGY
Of that Part of
GREAT-BRITAIN,
CALL'D
ENGLAND.

AS
Established by the CANONS, the COMMON
LAW, and the STATUTES of the Realm.

BEING
A Methodical Collection under proper Titles, of all
Things relating to the Clergy, which lie disper-
sed in the Volumes of those Laws.
But chiefly of such Things which depend on Acts
of Parliament, and upon Solemn Resolutions
of the Judges in the Courts at *Westminster*, in
CASES concerning the Rights Duties, Power
and Privileges of the CLERGY.

By *W. NELSON*, Esq; Author of the Office
and Authority of a *Justice of Peace*.

The Second Edition, with large Additions.

— *Durum ex me disce Laborem,*
Fortunam ex aliis.

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W. WELLS

TO THE
CLERGY
OF
GREAT-BRITAIN.

IT was the Prerogative of the First-born to be both King and Priest; and this may be a Reason why the eldest Son was to have a double Portion, that he might better support both those Dignities, which did formerly thus concur in one Person, till there was a positive Law to separate them, and that was not till the Priesthood was settled in Aaron, and the Civil Government in Moses.

The Church being then reduced to a Publick Policy, and governed by Priests of Divine Institution, it was necessary, that as such, they should be Reverenced by the People, therefore they were crowned with Mitres of fine Linnen, they offered in Vessels of Silver and Gold, and the very Wax-Lights by which they performed their Evening-Sacrifices, were set before them in Candlesticks of Gold; they were anointed with the same Oyl with Kings, and they had a Revenue suitable to their Dignity; which did not consist meerly in Tythes, but in a certain part of all the Sacrifices (except the Sin-Offering) in the First-fruits of Corn, Wine, and Oyl, in the First-born of Men, and all unclean Beasts which were redeemed at the Value of Twelve Shillings and Sixpence, paid to the Priest; and even among the civilized Gentiles it was an universal Custom to honour their Priests; and what is Universal hath always an Appearance of being reasonable.

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Thus the Romans had so great a Reverence for the Dignity of their Priesthood, that the Office of the Augurs was limited only to Families of Noblemen, which continued till the Tribunes of the People brought it among the Plebeians. Strabo tells us, that *plerunque ex eadem familia sunt reges & pontifices*: And we find that long before that Time it was imputed to Jeroboam to be as great a Fault as any in his Reign, to have chosen the Priests out of the lowest of his Subjects.

But to come nearer Home, the Clergy were in so great Esteem throughout the whole course of the British and Saxon Successions, that they were always the Judges of this Nation; and not only so, but their Judicial Determinations were usually grounded upon those very Laws which they themselves had proposed and approved.

And afterwards, when they had above the Third Part of the Land in their Possession discharged from all Services to the Crown, and from all other Duties but such which they imposed on themselves in their Ecclesiastical Assemblies, our Ancestors had not the least Suspicion that an ill Use would be made of those vast Revenues whilst in the Hands of the Clergy; and therefore an Alien might be presented to a Benefice which is a Freehold in Law, but a Lay-Alien was not allowed to purchase any Freehold, because it was presumed he would adhere to his own Country in Time of War, in which this Nation was then frequently engaged.

And as a farther Instance of that Esteem which our Predecessors had for Men of this Order, if any of them had committed a Fault which deserved any Publick Punishment, was never exposed till degraded, and then he suffered, not as a Clerk, but as a Lay-man.

But as 'tis usual for Men to run from one Extreme to another, so now we live in an Age where you who are the Priests of the New Covenant, are in a worse Condition than the Nethinims of the Old; you meet with Philistines every Day, who defy the very Notion of a Living God, and laugh at Revealed Religion, because it gives a check to a prophane Course of Life, and would make you who are the Ministers of the Holy Religion like Sampson, grind in the Mill, but without taking Toll: These Men would have you

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to be the *Missionaries* of the People; and if their Power was equal to their Prejudice, they would make you *Ministers* and *Shepherds*, not in the Metaphor, but in the Letter; or if you must exercise the Ministerial Function, they would confine you to that ancient and cleanly Part of it in scouring the Vessels, and sweeping the Churches.

These are the Men who are Born as the Wild Asses Colts, and yet would fain become Wise; which they attempt by advancing their Tinsel Reason above Revelation, who in their Wild Rapsodies of a Heated Conversation admire the Modern Spinoza for that Blasphemous Notion, in asserting the Holy Bible to be a complete System of Religious Errors; but if they had Leisure from doing nothing, to read all the Books which either he or Porphyry before him have wrote against the Gospel, they could never establish Irreligion by Argument: 'Tis true, they might, like them, make some vain Attempts against the Authority of the Scriptures, but to different Purposes; for Porphyry did it to advance the Philosophy of the Stoicks, who placed their chief Happiness in Virtue, who professed a great Severity in their Morals, and might therefore be called the Pharisees of Paganism.

But these Men expose Religion to secure themselves from their own Guilt; they gratify all their licentious Desires without Fear or Remorse, and are hardened by daily and inveterate Sins, which nothing can remove but the miraculous Operation of Grace; and living in a settled Neglect of all Divine Institutions, have not Stoicism enough to regard Virtue, either for the Advantages which attend it in this Life, or for the Rewards which it will bring in the next.

These accomplished Sinners distinguish themselves by a new Name of Free-Thinkers, and declare that nothing is so difficult to Men of Parts as to believe Revealed Religion; they have learn'd of the Peripatetick to explode all Prayers and Thanksgivings to God, pretending that the Purposes of an Infinite Being cannot be alter'd or determined by their Petitions, neither can such a Being stand in need of the Praises of finite Creatures; and if they have any manner of Religion, 'tis the same which the Dutchman said of Gro-

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tius, That he was of the Religion of the learned Men, that is, to believe what they please.

And yet when they are advanced in Years, as well as in Wickedness, when they are so old that Prophaness can be no longer pleasing to them in Conversation, then they begin to read the Scriptures, and endeavour to brighten the short Remainder of their Days by living up to the Divine Precepts of the Gospel; but 'tis——*cum numina nobis mors instans majora fecit*——having never before made use of that Thought which Arnobius did to persuade the Pagans to believe in the True God, viz. That they might be eternally Happy if they were in the right, but they could lose nothing if they were in the wrong.

'Tis true, some of these Free-Thinkers may in their Youth and Vigour exert themselves in very High Flights for the Imaginary Good of the Church; yet if it had no better Support it would stand as Tottering as the Ark of God did formerly in Uzziah's Cart; for rather than not to make Provision for the Flesh to fulfil the Lusts thereof, they would turn the very Churches into Taverns, and like Belshazzar, drink Wine with their Concubines there.

And yet such Men as these, who were Holy David's Fools, must now by a fatal Mistake, be imagined the Wits of this Age, if that may be called Wit, which consists in Lampooning your Character, in Reproaching your Persons with Approbrious Names, such as *Pulpitorum Crepitacula*, *Plebeculæ Cymbala*, &c. in declaiming against your Maintenance, in jesting you into a Contempt of the necessary Supports of your Lives, which they have told the World you should esteem as Types and Shadows, and abolish them with the Ceremonial Law: And, Lastly, By Rithming you into the Love of that Poverty which they hate above all Things: Thus the late famous Laureat tells you, That

YOUR

Your Saviour came not with a gaudy Show,
 Nor was his Kingdom of this World below ;
 Patience in Want and Poverty of Mind,
 Those Marks of Church and Church-men he design'd,
 And Living Taught, and Dying left behind. }
 The Crown he wore was of the pointed Thorn ;
 In Purple he was Crucified not Born :
 They who contend for Place and high Degree,
 Are not his Sons, but those of Zebedee.

But a wiser Man than our Poet hath told us, that tho' Wisdom is better than Strength, yet a Poor Man's Wisdom is despised, and his Words are not heard.

'Tis true, if the World was made of pure and refined Virtue, this would be a glorious Example for you to follow ; for then the Doctrine which proceeded from a Poor and Humble Priest, would have as great Efficacy on the People, as that which came from One cloathed in Purple and fine Linen.

But it has been long since wisely observed by the Satyrist, that—*Plurima sunt quæ non audent homines petula dicere lanà.* And 'tis plain, that in the very Rust of an Iron Age, Men will be governed by Opinion, not always built upon just and regular Motives ; that they will be influenced more by the Appearance than the real Value of Things and Persons ; and then it must necessarily follow, that he who Officiates in wretched Weeds, will render his Performance as Mean and Contemptible as his Person ; and that the People will not care how seldom they offer up Praises and Thanksgivings in those Churches which are not beautified so well as their ordinary Houses, and where the Priest is so much out of Repair.

* Juvenal, Satyr V. verse 130.

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'Tis therefore to be desired that the Church might be a very bountiful Mother to all her Sons, especially to those who use their utmost Diligence to advance the Kingdom of our Redeemer, for Godliness has the Promises of this Life as well as of that which is to come; and 'tis reasonable that you who are the True Ministers of the Christian Religion should be raised by a plentiful Subsistence above the ordinary Condition of Men, because the great Talents which are given to some, are much more serviceable to the Church when they are accompanied with a great * Revenue; but where the Clergy have a Maintenance suitable only to their common Necessities, and not to their Dignity; in such Case, the saying of Panormitan will always prove true, viz. *Ad tenuitatem beneficiorum necessario sequitur ignorantia Sacerdotum*; and where such Shepherds are, the Flock must needs go astray.

And yet such there are in many Places which might occasion the Archbishop of Spalato to make that severe Reflection on us, viz. That he saw nothing reformed but our Doctrine. And a Learned † Prelate of our Church hath observed, that the slender Provision of many Ministers is a Contempt upon Religion it self, and an unanswerable Prejudice to the Reformation.

Now since many of you labour under some of these Difficulties; and since all your Diligence and Application both by Preaching and Writing can scarce give a Check to the Opinions and Practices of unreasonable Men, or make any awful Impressions on them of that God, whom 'tis their Advantage as well as Duty to obey; therefore that the Concerns of your Civil Rights might not too much divert you from such difficult and useful Studies, I have collected all the Laws relating to those Rights, and reduced them under proper Titles, that you may at one View peruse all that is Pertinent to each Subject without Buying or Reading many Volumes in which they lay dispersed.

* It was the Opinion of Euripides, as translated by Ennius, that — *Quum opulenti loquunter parita ac ignobiles eidem dicta, eademque oratio aque non aque valet.*

† Preface to the History of the Reformation, 2 Parts.

Something of this Nature hath been already done by Sir Simon Degg, and with great Judgment, so far as he hath gone; and since him by Dr. Godolphin, who being a Civilian himself, hath so blended the Civil, Canon, and Common Law together, that in his Book there is an incoherent Mixture of all those Laws; and 'tis a meer Transcript of many Common Law Cases, without Order, Method, or Application.

It has been my Care in some measure to supply the Defects of those who have wrote on this Subject, and likewise to be serviceable to you whilst you are carefully discharging your Duties in this World to make all of us Happy in another.

And tho' such your Endeavours may be reviled with the senseless Name of Priestcraft; yet 'tis not to be doubted, but that Power which heretofore enabled a few poor Fishermen to subdue a great part of Mankind to the Obedience of their Redeemer, will still enable you to proceed in all Things necessary to the great Charge committed to your Care; and as this may be a Means to remove that Contempt and Scorn which some profligate Men have raised against your Persons, so it may be an effectual Method to preserve the Church from Danger.

It may be in Danger by Divisions among your selves, and yet even then God may shew it some particular Marks of his Favour; but it must be as Moses told the Israelites, not for the Righteousness of her Sons, but for the Wickedness of her Adversaries. You all know that the Christian Religion ought to be indivisible, because 'tis the only True One, and proceeds from One God, and from One Truth.

But it may justly be a Wonder now (as it was formerly to the famous * Charron) that it should be divided into so many Sects and Opinions, insomuch that there is not an Article of the Christian Faith, or any Point of Doctrine but what has been opposed and contradicted.

What Disputes were there between the Lutherans and the Reformed, *De persona Christi & de cænâ Domini?* And was it not a surprising Answer to Scultetus, the Elebor Palatine's Chaplain, who earnestly exhorting the Di-

* Cap. 1. Lib. 3.

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vines to live in Union, tho' they might differ about the Sense of some Texts of Scripture, viz. That Political Friendship was never refused, and Theological should never be granted.

But all manner of Friendship seems to be now laid aside among Christians, and more Devisions are fomented between them than are to be found among Jews, Mahometans, and Pagans, the two first have very few and but inconsiderable Differences; and though there are many among the Heathens, yet they never produced such dismal Effects as to subvert Kingdoms, divide Emperors, or to disturb the Government of States; all which hath been done by Christians, to the Scandal and Reproach of that Religion which they profess, and this under Pretence of Zeal for it; a Zeal which has kindled such a Flame among the divided Parties, that they not only hate one another, but think it lawful to commit all manner of Hostilities by turns; as if Christians were only permitted to be inveterate against Christians, without any respect to Merit or Kindred; as if it was a Fault to be Compassionate, or even Civil to those of a contrary Party or Opinion; and as if Religion taught them to be spiteful, and to persecute each other.

The Historians of the last Age tell us, that there was a Vicar of Christ on Earth, who was a Disgrace to his Church, for throwing St. Peter's Keys into the Tyber, and at the same Time declaring he would use St. Paul's Sword, and for appearing afterwards in a war-like Habit when the People were in Procession to pray for Peace; and 'tis a poor Excuse which Cardinal Pallavicini made for his furious Man, viz. that the Church was then in Danger, and had need of a war-like Pope.

The like Excuse might be made for the Violence and Fury of Luther; but tho' the Writers in this Time commend his unshaken Constancy for the Truth, yet it was always imputed as a Fault, that he could never bring himself to any manner of Temper towards those whom he once opposed; he never considered what St. Austin has taught us, That 'tis a very difficult Thing to distinguish Truth from Falshood, and therefore we should never be violent against those who Err.

'Tis Reason and Conviction which make sincere Converts, and build up the Walls of the Temple where Persecutions widen the Breaches, and cause such Divisions among the People which may shake the Foundations of a Church, though Built on a Rock, and at last dash it in Pieces; this Danger we have once, and not many Years since, escaped; and if we do not grow wiser by the Mischiefs which were then in View, we shall neither be respected at Home or Abroad; which puts me in mind what a learned Prelate who was present at the Synod of Dort, observed upon the old Poet Prudentius, that he spoke like an Oracle in these words:

-----Scissura Domestica turbat,
Rem cleri titubatque foris qui dissidet intus.

Therefore 'tis to be wished that you may never be distinguished by Approbrious Names or Characters, which in Time may make the Church truly Militant, and then Religion may be in danger of being stormed out of the World; for as intemperate Zealots seldom give, so they cannot expect Fair Quarter.

'Tis likewise to be desired, that Moderation which hitherto hath been counted a Virtue, may not lose that noble Character, and be turned into a Name of Reproach; and that a well-tempered Zeal for our Religion may not be branded with Lukewarmness, unless 'tis hot enough to scorch our Charity, which hath so long been esteemed a Saving-Grace, and which will ever continue one of the brightest Parts of Christianity. It was for this Virtue that some of our * Ecclesiastical Writers have made such mighty Elogies on the Emperor Jovian, who always declared for the Orthodox Party of Christians, but could never be perswaded to expel those from their Churches who were of a contrary Opinion.

He discouraged all manner of Disputes about Religion, and had a great Esteem for those Men who were for promoting Peace and Unity, and he designed by his Gentleness and Mildness to extinguish all the Schisms of the Church.

This was certainly a more effectual Means to do it than the fiery Temper of Elisha, which made another Prince ask him, whether he was the Person who troubled Israel.

* Socrat. Eccles. Hist. Lib. 3. Cap. 25.

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But if there is any now among us who would imitate his Severity in destroying the False Brethren, I hope they will not pretend to justify themselves (as that Prophet might have done) by any Inspiration or Special Commission from God, but rather consider that our Saviour himself was of a quiet and peaceable Temper; he was never seen in Whirlwinds, Earthquakes, or Fire, but in a still small Voice, which appears not only thro' the whole Course of his Life, but in the remarkable Rebuke which he gave Two of his furious Disciples, viz. That they did not know of what manner of Spirit they were: But I may venture to say they were of a Spirit not very suitable to the Design of his Coming into the World, for that was to Save and not to Destroy.

It was he who pronounced a Blessing on the Peace-makers, and to such he gave the glorious Title of the Children of God; and tho' their Condition here is often unfortunate, because he who will not be a Hammer to knock down all of an opposite Party, is now made an Anvil on which both Sides continually beat, yet he will certainly in the next World enjoy the promised Blessing as a just Reward for the Calmness of that Temper which exposed him to so many Sufferings here.

Therefore let it never be forgotten, that Unity, Love and Meekness are the distinguishing Marks of the Chaplains of the Prince of Peace; that Violence adds neither Beauty or Strength to a good Cause, and Truth is always attended with Gentleness.

Let it likewise be remembered, that it was the Dove and not the Raven which returned with the Olive-Branch in its Mouth; and lastly, let us all unite in our hearty Desires, that the Peace of Jerusalem may be duly considered and always preserved in the Chamber of that Name.

WILL. NELSON.

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Advertisement.

I Am of the same Opinion with the Author of a late Preface to a Performance of this Nature, That it cannot be Perfect in one Edition, or in any one Age; for since the former Impression of this Book, I have added something material almost to every Title in this Second Edition; not collected from Proclamations, or from any such binding Authorities as they are called in the Title-Page and Preface of that Work, but from the Labours of the most Learned Men in several Ages, who have treated of the Laws relating to the Church and Clergy of *England*.

W. N.

N. B. The Author's living a great Distance from the Press, has occasioned some Errataes in the following Book, which the Reader is desired to mend.

A B B I E S.

IT may seem unnecessary to mention any thing under this Title, because all Abbies, Priories, and other Religious Houses of Monks and Fryars are now dissolved, and their Possessions given to the Crown, and the Order of Abbots is wholly extinct.

But since the Ecclesiastical State of *England*, as it now stands, may be better understood by informing the Reader how it was before the Reformation; I thought it not Impertinent to my present undertaking to give some Account of the Foundation and Endowment of Abbies and other Religious Houses, the Means by which they afterwards acquired great Riches, and incidently of other Matters relating to this Subject till the time of their Dissolution.

Abbies were certainly founded and endowed for Religious Purposes, and were Places where Holy Men retired from the busie Affairs of the World, and there spent their Time in Solitude and Devotion.

And at first, such was the wonderful esteem that both the Prince and People had of the Piety of those Men, that it procured very large Privileges and Exemptions from the one, and immoderate Charity and Riches from the other; for tho' by the ancient * Common Law of *England*, a Man could not alien Lands which came to him by Descent without the concurrence of his Heir, yet he was allowed to give part of it to God; that is, to such Persons who were separated and devoted to his service, as Abbots and their whole Convents were then held to be: and besides, it was a customary Duty in those Days, for every Man in the Parish, or within such a District, to give to the Church a certain measure of wheat every Year on *St. Martin's* Day; and this in our ancient Books is called *Church-feed*.

But not contented with so small a Tribute, the Monks persuaded the People that nothing was more acceptable to God than those Gifts which Princes and Rich Men bestowed on the Church; and because the meaner sort had little to give, yet something must be had from them; and for that purpose, Masses both for the living and the dead, Dispensations, Jubilees, and indulgences were introduced, that every body might contribute something to gratifie the desires of those Men.

* *Glanvil*, lib. 7. cap. 1. fo. 44.

But as these Abbies increased in Riches, so the State became Poor; for the Lands which these Regulars possessed were *in mortua manu*, they could never revert or escheat to the Lord who gave them, and, such was the blindness of that Age, that they were exempted from Knights Service, and all other Temporal Services for the Defence of the Kingdom.

It was for this Reason that (b) Laws were afterwards made to prohibit Gifts to those Religious Houses, and my Lord Coke tells us, that several Lords at the creation of the Seigniorie had a Clause in the very Grant, that the Donor might give or sell his Land to whom he would, *Exceptis viris Religiosis & Judæis*; so that these religious Men were put under the same Incapacity with the Jews, who were Enemies to the Christian Religion; and well they might, for they were then degenerated from that strictness and severity of Life, for which their Predecessors were so much admired; and as if the Confluence of such large and ample Endowments and Riches was not enough to support them in a luxurious course of Life, they were still contriving to get more and to evade those Laws which stood in their Way. As for instance:

The first Statute against Gifts in Mortmain did not do them much hurt, for they always employed the most cunning and learned Men in the Law, and my Lord (c) Coke commends them for it; but what was it to do? Why, It was to find ways to creep out of the Statute, for that prohibited only Gifts to Religious Houses, and therefore notwithstanding that Law they obtained Long Leases of Lands, which could not be comprehended under the Word Gifts.

But then by another Statute 7 Ed. 1. they were prohibited, that *nec arte vel ingenio terras vel tenementa sibi appropriare presumant*, and this was under the Penalty of forfeiting such Lands; but this Law extending only to Gifts, Alienations, and other Conveyances made to the Parties, did not comprehend Lands which were recovered by a legal course of Law, and therefore they would bring a *præcipe quod reddat* against the Tenant, and would get him by Collusion to make Default, and thereupon a Judgment was obtained to recover the Land, which was entred accordingly; and when this Contrivance was found out and prohibited, then they invented Feoffments to Trustees and their Heirs, for the use of them and their Successors, and this was afterwards adjudged to be *In mortua manu*.

I only mention these things to shew, that these Orders of Men did not altogether spend their time in Devotion, and in the Service of God, but in consulting the ablest Lawyers to evade those Laws which were made against their temporal interest; and by this means they got the best part of the Lands of England into their possession; which they could never have done, but in

(b) Magna Charta, cap. 30.

(c) 2 Inst. 75.

Times when the People were generally disposed to believe any thing which came from their Priests, who could easily impose on them the grossest Deceits, without any manner of precaution to prepare their Belief.

It would take up too much time to mention the Excess of the Peoples Credulity, and the Folly of Monkish Traditions, of which I shall give but an instance or two and no more.

They made the People believe that *St. John* lay in his Grave at *Ephesus* as a Man sleeping in his Bed; and as the Cloathes are seen to move when the Man breathes, so the Earth of *St. John's* Grave was seen to rise and fall in such intervals.

They made them believe, that as soon as a Monk put on the Habit of his Order, all his former sins were forgiven; and tho' the amazing Riches which were heaped in their Churches and Chappels were in no wise suitable to their Vow of Poverty, yet the People must believe they had a due regard for the performance of that Vow, tho' they all renounced it by their Practice.

And here I cannot but take notice that some of them were not contented with those vast offerings which the Miracles of their own Saints procured, but have grasped after more; as for instance, the Reliques of *St. Martin* being carried through *France* in Procession, were at last placed in the Church of *St. Germain* where they performed several Miracles; but the Priests of *St. Germain* thought their Saint not at all inferiour to those of *St. Martin*, and therefore demanded one half of the Offerings:

The Priests of *St. Martin* insisted, that their Saint performed all the Miracles, and therefore they claimed the whole; and to decide this difference a *Leper* was placed between the Shrines of both those Saints, who happen'd to be healed on that side next *St. Martin's* Shrine, and turning himself was likewise healed on the other side; so that *St. Martin's* Priests had the whole.

Now because this extraordinary Cure should not derogate from the Saintship of *St. Germain*, the famous *Cardinal Baronius* has wisely solved the Difficulty, by telling us, that *St. Germain* suspended the Power which he had to work Miracles, not because he was inferiour to *St. Martin*, but in Civility to him, because he had favoured *St. Germain* with a Visit.

It was in the darkest Ages of Superstition when such ridiculous Stories could gain any Credit; but when the People were disposed to a Reformation, then they could easily see thro' all those Cheats with which they and their Ancestors had been so long deluded: This puts me in mind what *Cicero* said upon another occasion, that there was not an old Woman so silly as to believe the Stories invented concerning *Hell*; It was a Reflection which he made on purpose to prove that fabulous Traditions must vanish with Time; but that True Doctrines are rooted deeper by Age, to which * *Juvenal* seems to allude in these Verses,

*Esse aliquos manes & subterranea Regna
Et Contum & Stygio ranas in gurgite nigras ;
Atque unâ transire vadum tot millia Cymbâ
Nec pueri credunt, nisi qui nondum are lavantur ;
Sed tu vera puta :*

One would wonder that such Traditions should obtain for so many Ages, and that those Abbies, which were built *in laudem & honorem Dei*, should continue so long, after they were filled with licentious Monks; who, by Cheats and Impositions, and other miraculous Whimsies, had got all the People hid in this World to secure them a safe Passage into the next; but so it was till the Reign of *H. 8.*

'Tis probable that King intended only at first to reform these Abuses, and not totally to dissolve the Houses, but they chose rather to Rebel than Reform, for about two Years before he appointed any Visitation of these Regulars, there were two Rebellions; one in *Lincolnshire* headed by a Church-man, but disguised in the Habit of a Cobler, and directed by a Monk; the other in *Yorkshire*, where one *Ask* was their Captain, and this was called, *The Pilgrimage of Grace*; for some Priests marched before the Rebels with Crosses in their Hands, and Crucifixes in their Banners.

But these Rebellions being suppressed, the King about the 28th Year of his Reign appointed Visitors to inspect all the Abbies, and to examine every thing which related either to their Conversation or Superstitions, and to report it to the Lord Vicegerent *Cromwell*.

But if the King did always intend a Dissolution of these Bodies of Men, it was now the more easily to be effected, for some of the Abbots had been guilty of comforting and assisting the Rebels, and others were convicted of Disorders by the Visitors; and thus most of them perceiving their time of Dissolution drawing near committed great Waits; so that by these Motives they were induced to *Resign* their Houses to the King, that they might have a better Title to Pensions during their Lives.

It was by these Resignations that the Houses and Lands of Abbots became vested in that King, which were afterwards granted by him to the People, under which Grants they are enjoyed to this Day.

Some Writers in the late Reign of King *James II.* gave the present Possessors a very large assurance of their Titles, so that they would not be in any danger of losing their Lands, if Popery should have been established here, because the Pope himself had granted a Dispensation in this Case, with a *non obstante* to the Canon Law.

However this was not much regarded; for the Plenitude of the Popes Power is so extensive, that it may be a Question (where that prevails) whether it can be bound by any Acts of his Predecessors.

'Tis

'Tis true we were then told that what was done by any former Pope, could not well be revoked at that time, which is as much as to affirm that it might be done when Opportunity served.

But the present Possessors have a better Title to those Lands than the Popes Dispensation can give them; for as I have mentioned, most of them were surrendred to the King by the Abbots and Convents themselves, and these Surrenders were all confirmed by Act of Parliament.

The Pensions of those Abbots who surrendred were proportioned to their Crimes or Innocence, but the Monks were allowed not exceeding Eight Pounds during their Lives, or until they should be provided with Livings, which they were certain to have upon every Vacancy, because those who purchased the Abby Lands of the King were to pay these Pensions to the Monks out of the Rents of the suppressed Monasteries; and to ease themselves of that Charge, the Purchasers were very industrious to provide Livings for them.

But this was a wrong Step to Reformation, because the greatest Part of the Clergy were (by this means) such who had been formerly ignorant Monks and Fryars, which Sett of Men were not worn out till the Reign of Queen *Elizabeth*; and then those of better Education were placed in the Churches.

It has been often insinuated as a reproach to that Reign in which these Monasteries were surrendred, that it was a robbing of God; and that it was a covetous desire of their Riches which made the King so intent upon the Reformation.

In answer to this, I must admit that Churchmen ought to have such a Subsistence which may secure them from all Secular Cares, and from that Contempt which is always incident to Poverty.

They ought likewise to have sufficient for charitable Uses, and to support Hospitality; for by this Means they win and engage the Affections of their People.

But when they grasp after great Riches, when by pious Cheats they had fraudulently obtained from an ignorant and unthinking Laity the greatest part of their Possessions and Riches, and when those Riches were seldom or never applied to any Religious Purposes, then it became the Interest of the Nation in general, and of the Government it self, to reassume those Lands, which had so long continued useless to the Support of the one, or Defence of the other.

The Histories of those times inform us, that the Abbots became rich by false opinions and notions of Purgatory imposed on the People, by Relicks, Masses, and other superstitious Solemnities, and what is worst of all, by the spoil of the Church it self; for both the great and small Tythes which belonged to the Secular Clergy (that is to Parsons) were in many Places taken from them, and by the Popes Authority given to and vested

vested in the Monasteries, and the Abbots allowed those who served the Cure but small Stipends, and where they were most liberal, it was only to permit the poor Vicar to have the small Tithes.

Now when those Monasteries were dissolved, by reason of great Abuses which were committed in them by Monks and Friars who were a Scandal to their Order, their Revenues might with more appearance of Justice have been settled on the secular Clergy rather than on Lay Men; and this had been agreeable to the Opinion of St. *Augustin*, who maintained that the Emperor did very justly in taking away the Ecclesiastical Revenues of the *Donatists*, and giving them to the *Ortodox*; and *Luther* himself many Ages after him declared, That the Revenues of the Church of *Rome* ought to be appropriated to the maintenance of Ministers and Schools.

But it is natural to Mankind to be always in Extreame, for when these Abbies were dissolved, and all the old Monks dead or provided with Livings, so that their Pensions ceased, those who purchased their Lands of the Crown, had them charged with no other Incumbrance, but with that poor Stipend which the Abbot had given to those who officiated at the Altar, and which as the learned Lord Bishop of * *Sarum* rightly observes, is not a competent Maintenance for a Clergy-man now, for it would scarce support a single Man then, without the additional Helps of Fees for Obits, Exequies, Masses for poor Mens Souls (for the Abbots themselves had the Profits from those that died rich) and such other Perquisites, all which are now gone, and nothing in the Room; so that the Clergy in many Places have a very narrow Subsistence, which certainly makes them subject to want, and by consequence to Contempt; and this he tells us was the greatest Mischief which befel the Church at the Reformation, that there was not a better Provision then made for the Clergy.

'Tis true this was not only a great but a very unequal Change; for Men who lived in the greatest Ease and Plenty, to subsist upon a Pension of 8*l. per Ann.* for none of the Monks had more, and all of them could not be provided with Livings: For Men who to distinguish themselves from the rest of the Ecclesiasticks, were called Regulars, because they did or should live under certain Rules of Government in their Houses; I say for these Men to be blended amongst the Laity, and spend the rest of their Days in a poor and neglected manner; for these Men who had the Honour to see the Heads of their Houses *misred*, and exempt from the Jurisdiction of the Bishop, by particular Grants from Kings, as *Abingdon* by King *Kenulph*, *Battle* by *William* the Conqueror, &c. and not only so, but to exercise Episcopal Authority within their own limits, and who were

* Pref. to 2 Vol. of Hist. of Reform.

Lords of Parliament themselves; and likewise to see the very same Persons stript of all those Privileges and Preferments, and to live many Years afterwards less regarded than the Porters of their Abbies before the dissolution, and what is still worse, to entail Poverty upon most of the Vicars of this Kingdom.

I grant there were no fix'd number of those Abbots who were Lords of Parliament, but there were always some; in 43 H. 3. there were 102 Abbots and Priors summoned to Parliament, in the Reign of Ed. 1. and Ed. 2. there were 50 and sometimes 80 and more, that the number of Regulars might come nearer to the number of Seculars, not that they esteemed it any great Honour to be summoned by a Layman tho' a King, for their Obedience was due only to the Pope, and therefore we have Instances when they refused to attend the Parliament upon the King's Summons.

And it hath been a Question, that when they did ^e there, whether it was as part of the Ecclesiastical State, or as ^s holding their Lands of the King *per Baroniam*.

In answer to which, I find that under all the *English Saxon* Kings, they held their Lands in Frank Almoigne, and then they fate there in their Spiritual Capacity.

But King *William* the Conqueror, to keep them a little closer to his Service, altered that Tenure, and appointed that they should hold of him *per Baroniam*: and my (a) *Coke* tells us, that of those Abbies which were of the King's Foundation, and which were held of him *per Baroniam*, the Abbots, by vertue of that Tenure had a Right to be Summoned to Parliament, and were Lords of Parliament.

And this is confirmed by the *CHARTER OF EXEMPTION* (b) of the Abbot of *St. Augustine* in *Bristol*: for the Writ sets forth that the Abbot complained that he was summoned to Parliament, *Licet ipse non teneat per Baroniam seu aliquo alio modo in Capite*, nor that his House was of any Royal Foundation, *Per quod de veniendo ad Parliamentum de jure Summoneri debeat*.

So where the Abbot of *Fairplace* complained of the like Summons, (c) when he held all his Lands, *In pura & perpetua Eleemosyna & non per Baroniam aut alias in Capite per quod ad Parliamentum Summoneri non debeat*.

And (d) *Mr. Selden* is of Opinion, that where it appeared that the Abbot *nihil tenuit de Rege*, that was a sufficient Reason why he should not be summoned,

'Tis true several Abbots, who did not hold *per Baroniam*, were summoned to Parliament upon extraordinary Occasions, in several Reigns after the Conqueror, but this was not *de jure*, it was only for their Advice and Assistance upon pressing Circumstances, but those who held *per Baroniam*, were Lords of Parlia-

(a) 2 Inst. 3. (b) *Prynne*. on 4 Inst. 335, (c) *Prynne*, ib, 335. (d) *Seld.* Tit. Hon. 730.

ment, and had a right to be Summoned, and sit with the rest of the Peers.

Of these some are of Opinion that there were 26, my * Lord Coke tells us they were 27, but || the Bishop of *Sarum* mentions 28, at the time of the Dissolution.

| | | |
|--------------------------------|-------------------------|---------------------|
| <i>Abingdon,</i> | <i>St. Edmondsbury,</i> | <i>Selby,</i> |
| <i>St. Albans,</i> | <i>Evesham,</i> | <i>Shrewsbury,</i> |
| <i>St. Austin, Canterbury,</i> | <i>Glastenbury,</i> | <i>Tavistock,</i> |
| <i>Battle,</i> | <i>Gloucester,</i> | <i>Tewksbury,</i> |
| <i>St. Bennet,</i> | <i>Hide,</i> | <i>Thorney,</i> |
| <i>Berden,</i> | <i>Malmesbury,</i> | <i>Waltham,</i> |
| <i>Cirencester,</i> | <i>St. Mary, York,</i> | <i>Westminster,</i> |
| <i>Colchester,</i> | <i>Peterborough,</i> | <i>Winchcomb.</i> |
| <i>Coventry,</i> | <i>Ramsey,</i> | |
| <i>Geoylark,</i> | <i>Reading,</i> | |

To conclude this Title, it may not be improper to shew what Difference the Law made in some particular Matters relating to Abbots and other Secular and Religious Persons before the Dissolution.

The Property of the Goods of the Abby was in the Abbot during Life, but after his Death then it was in the House, and this was the Reason that at Common Law if such Goods were taken away in the Life-time of the Abbot, his † Successor could not have an Action of Trespass, for by the taking the Property was divested.

This was remedied by the Statute of *Marlbridge*, by which it was provided that the Successor might declare *Quare bona & catalla Domus & Ecclesie sue tempore R. Predecessoris sui cepit*, &c. which the Successor of a Bishop, Dean, or other Secular Ecclesiastick cannot do, because there is an Alteration in the Church, by the Death of those Persons; but there was none by the Death of an Abbot, for the House continued still the same, and therefore the Abbot might have an Assize for a Disseisin, or an Action of Wast, for any Wast done in the Life of his Predecessor; which a succeeding Bishop, or a Dean, cannot now have for the Reason abovementioned.

But the Abbot was only capable of taking a Feoffment, it could not be made to him and his Convent, for they were dead Persons in Law.

Abjuration.

THIS is where a Man committed Felony, and for the Safety of his Life fled to some Church or Church-yard, and there, before the Coroner, within 40 Days, confessed the Fact,

* 2 Inst. 585. || Hist. Reform. 267. † 9 H. 6. 25.

and took an Oath to be banished perpetually from his Native Country, but not to a Country of Infidels; and this was called Abjuration.

It was founded upon the Privilege of Sanctuary; for the Church-men, in those Days, had not much regard to the Properties of Men; for if Goods were stolen, *Et rem ad Ecclesiam confugisset, vitam habeat*; that was the Doctrine at that Time; yet they were very careful of their own Goods: For if a Man had committed Sacrilege, he could not have any Privilege of Sanctuary, and therefore could not abjure, but was hanged.

By the Statute 1 Jac. 1. this Privilege of Sanctuary and all its Dependencies were wholly abolished; so that Abjuration, founded upon that Privilege, is quite gone.

But Abjuration upon the Statute (e) for not coming to Church within three Months after Conviction was lately in force, till that Penalty was likewise taken away by a late Act (f) of Parliament, upon taking the new Oaths, and Subscribing the Declaration therein mentioned.

Yet there are some other Abjurations still in Force, and those which relate to Clergymen, as by the Statute (g) all Persons who are admitted into any Office, *Civil or Military*, must take the Test, which is an Abjuration of some Doctrines of the Church of Rome: But Ecclesiastical Offices are distinguished from the Civil, and as such cannot properly be called Military; and therefore Parsons and Vicars are not within that Act, and by Consequence not bound to take that Oath.

But the Case is not the same with Bishops and dignified Church-men, for they are within the Act, because they have a *Civil* Jurisdiction and Authority annexed to their Offices by keeping Temporal Courts, by Licensing Physicians, and Probates of Wills.

There is likewise another Oath of Abjuration, (h) which Clergy-men are expressly enjoined to take, and that is to abjure the Prince of Wales within three Months after they are inducted to any Benefice; and this may be done either in the Courts at Westminster, or at the Quarter-Sessions where they reside.

Absolution.

THIS very certain that our Saviour left Power in his Church to absolve Men from their Sins; but this was not an absolute and unconditional Power vested in any of his Ministers, but it was founded upon Repentance, and upon the Penitent's Belief in him alone.

These are the Conditions of Absolution, which is not a Pardon as proceeding from the Lips of the Priest; for what is done

(e) 35 Eliz. cap. 1. (f) 1 Willi. cap. 1. (g) 25 Car. 2. cap. 2. (h) 13 W. 3. cap. 6.

by him is only Declaratory of a Pardon from God to him who truly repents and believes; for where God doth not absolve, the Priest cannot.

And that the Power of the Priest is only ministerial, in this Case we have the Testimony even of our Adversaries in former Ages; for *Ferus*, who was one of the most learned Monks in the 15th Century, in his excellent Commentary on St. John's Gospel, affirms, that *Apostoli remittunt peccata non simpliciter, sed quia adhibent media* (viz.) *Verbum Dei & Sacramenta, per quæ Deus remittit peccata.*

I will not affirm but 'tis very probable that this may be one of the 67 Places in his Commentary on that Gospel, wherein the Spanish Jacobin Dominus a Soto accuses him of teaching *Lutheranism*. It must be agreed that 'tis not a Catholick Doctrine, for the famous Cardinal Bellarmine, who was the best Penman in the next Age, especially in Matters of Controversie, tells us, that Christ gave his Church a *Judicial* Power to absolve Sins, which he proves by the *Metaphor* of the *Keys* (viz.) *I will give thee the Keys of the Kingdom of Heaven*; which words cannot signifie that the Door is opened, but a Power to open:

Now as to this Matter 'tis sufficient if a Similitude answers the chief Intent for which 'tis produced, and if so, it ought not to be extended to every Circumstance, and certainly this is sufficiently done by the Ministers declaring, that Heaven is opened by Faith and Repentance; and tho' every Christian may declare this, yet none so powerfully as the Minister himself, because of the Dignity of his Office, and the Authority which he hath by a Special Commission from God, to make such Declaration.

Therefore 'tis a senseless Insinuation which Men make against the Clergy, as if they were so vain, as to think they had Power in themselves to absolve Men from their Sins, when they have no manner of Power in such Case, but what proceeds from Faith and Repentance.

'Tis true, the Words by which this is done, are Words of Authority, (viz.) *I Absolve thee, &c.* The old Way of Absolution was by Prayer and Imposition of Hands; but that was disused about the Beginning of the 12th Century, and the new Method introduced under those authoritative Words; and because the natural Import of such a positive Sentence might lead Men into an Opinion, that the Clergy assumed a Power of pardoning Sins, therefore it was always tempered with some softer Expression, (viz.) *I absolve thee, in so far as 'tis granted to me, or as far as the Accusation comes from the Penitent, &c.*

In former Days the Pope alone assum'd this Power of Absolving, &c. which *Wickliffe* opposed here, by alledging that it was in every Priest; and one of the Articles which the Pope sent to our King R. II. complaining against that good Man, was, that he had asserted *Hoc debet credi Catholice, quod (i) Nulliter*

(i) Prynne. on 4 Inst. 225.

Sacerdos rite ordinatus habet potestatem sufficientem quemlibet contritum à peccato quolibet absolvendi; where the Word *Contritum* seems to be the Foundation of Absolution, for without Repentance there can be no Pardon.

And here I shall mention in what manner *H. 4.* was absolved by *Pope Gregory 7.* who at first was inexorable, but afterwards being entreated by several Princes and others, he promised to give him Absolution, thereupon the *Emperor* began his Journey in *January*, accompanied with the Empress, and one of their Children, with a very small Retinue; they pass'd the *Alpes* in that cold Month, and being come into *Italy*, the Pope insisted that the Emperor, in order to manifest his Repentance, should first send him the Imperial Crown, and all his other Ornaments of Sovereignty to dispose at his Pleasure, and that he should publicly confess that what he had done to offend made him unworthy of being an Emperor.

But these Terms being thought too rigorous, he was earnestly entreated to mitigate them, and at last consented upon Condition that the Emperor would resolve to do whatever should be enjoin'd him for a Penance, to which he submitted, and went to the first Gate of the Castle, expecting what should be enjoin'd him, which was as followeth:

‘ He was ordered to enter that Gate alone without any Attendance, he was stopped at the second Gate, and obliged to lay down all the Ensigns of Majesty, and to put on a coarse woollen Coat, and to stay there bare-footed from Morning to Night, and some say with Cizars, and a Broom in his Hand, as submitting to be shorn and whipt; in this posture he was to stand three Days before he could be admitted into the Presence of the Pope, and on the fourth Day he was reconciled to the Church, upon Condition that he should submit to the Judgment which the Pope should give about the Accusation brought against him, and that in the mean time he should not exercise any Act of Sovereignty.

I mention this to shew that the Power of new *Rome* was a greater Prodigy than that of old *Rome*, but now her Conquests are at an End.

But to return, Absolution is usually given to dying Persons, who have but a little time to repent; and in such Case there may be some Difficulty how the Minister shall be satisfied, that the Faith and Repentance of an expiring Sinner is sincere, and how he shall know that it is accepted, in order to the Remission of his Sins; for if the Minister is not satisfied in these Particulars, he hath no Authority to apply the Promises of Grace and Salvation to the dying Person.

All that can be said in this Case, is, That after the Minister hath solemnly addressed himself to God, in Prayers, and particularly upon this Occasion; he ought afterwards seriously to apply himself to the Penitent, and to examine him concerning
his

his present State and Condition; and if he find that his Conscience is touched with a Sense of his Sins, then he ought to encourage him in the Progress to a sincere Repentance; and when all that is done, he must leave the Success, where infinite Mercy is to be found.

Therefore those Ministers, who in *April, 1696.* absolved *Sir John Friend*, and *Sir William Parkyns*, at the Place of Execution, were justly censured, by the Governours of the Church, to be both insolent and irregular in that Act, because the dying Persons were not moved by them to make any Confession of their Sins, or at least of that Sin of High-Treason, for which they were to suffer; for they were so far from believing it to be a Sin, that they expressed a Satisfaction to die for it, therefore they could not repent, or desire Absolution in such Case; so that Absolving then was not only a Justification of that Crime, for which they were condemned; but a bold Affront, both to the Laws of the Church and State.

Abstinence.

I Think nothing hath been more abused than this Virtue of Abstinence, which is recommended to us by the Church, and which we ought to observe, so far as it tends to depress any inordinate Appetite, and make it more subservient to the Purposes of Religion.

'Tis this, and only this, which may be truly called a religious Abstinence, for it humbles our vicious Natures, and by that means raises our Minds to a due Sense of Prayer and Devotion.

But there is another Sort of Abstinence, which is called *Ritual*, and which consists only in abstaining from particular Meats, at certain Times and Seasons; and this is prescrib'd as a Task, which we must undergo to expiate our Sins, when at the same time we are allow'd to indulge our Appetites with all manner of delicious Wines, and with any other nourishing Meats, but those which for that time are prohibited.

So that this *Ritual Abstinence* is a mere Mockery put upon Religion; it cannot be any manner of Penance, and yet 'tis believ'd to be so, and to be compleated too, when the Fasting (as they call it) is over.

But certainly Men must have a very slender Opinion of their Sins, when they can believe they are so easily expiated; not by any severe and afflicting Abstinence, which may mortifie our Natures, and make us more intent upon religious Duties, but by drinking the most pleasant Wines, and feeding upon all other Delicacies, which either Art or Nature can provide for us.

This merry and pleasant sort of Abstinence, being so widely different from that which was instituted by the Church, in the primitive

primitive Times, and so agreeable to our natural Inclinations, must necessarily expose the other to Scorn and Contempt; and those who despise the Institutions of the Church, have always very mean Notions of Religion, and are bold and ignorant enough to despise even God himself.

It was the Spiritual Monarch of the *Western World*, who introduced this *Ritual Abstinence* amongst the People, who at first attempted only to govern the *Ecclesiasticks* by his Law called the *Decretals*, which were publish'd here in the Reign of King *Stephen*; but afterwards he brought the Laity under certain Laws and Rules, and particularly under those of Abstinence, which were then call'd *Rogations*; but so grossly abused from the true Design and Nature of Fasting, that a certain Bishop of *France*, in Imitation of the Pope, instituted certain Days of Abstinence, as Sir *Henry Spelman* tells us, which were to be a Sovereign Remedy to cure the *French Pox*; and it was to be perform'd, by walking about 37 Miles, in middle *Lent*, to the Church of St. *Julian* the Martyr, and singing there; but how long he doth not mention.

Fasting is certainly one of the greatest Penances which can be laid upon the Northern People, especially upon such who are Rich, and have been accustomed to eat much and drink more; and if the Christian Religion had at first been planted in those cold Countries, 'tis probable the Governours of the Church would not have sent such severe *Canons* into the *East*, about Abstinence and Vigils, as those of the *East* sent to the Northern Nations.

Admission.

Since the Office of a *Presbyter* was instituted by Christ himself, for the publick Benefit of Mankind, 'tis requisite that the Entrance into such Office should be so well guarded, that no Man might take that Honour upon himself, except he is call'd of God, as * *Aaron* was; and this is by Enquiry how the Person is qualified.

I shall not mention what Care hath been taken by the very Heathens to admit none to the Priesthood but those who had undergone some Exemplary Trials, by which they gave sufficient Proof of their Virtue, but shall only observe that St. *Paul* gives Rules to † *Timothy* after the Church was settled at *Ephesus*, that the *Deacons* should be first proved before they should be admitted to that Office, and by a Decree of the Council of *Sardinia*, assembled by *Constantius* and his Brother *Constans*, it was ordered that the Candidates should be examin'd with all Exactness.

* 5 Heb. 4. † 1 Tim. 3. 10.

Agreeable to this Canon Admission here with us is, when the (k) Bishop, upon Examination of the Clerk, admitteth him to be able to perform the Office of a Priest, for which, by the 135 Canon he is to take no manner of Fee, and 'tis done in these Words: *Admitto te babilem, &c.* and 'tis the Opinion of very learned Men, that this Right of Admission was vested in Bishops ever since Christianity was received in this Nation.

Under this Title, I think it proper to mention,

- (1.) The Qualifications of the Clerk who is to be admitted.
- (2.) What the Canons require of a Bishop relating to the Admission.
- (3.) And lastly, What are good Causes why the Bishop should refuse to admit, and what not.

And first, As to the Qualifications of the (l) Clerk, he must be 23 Years old, and a Deacon, before he can be admitted to any Benefice with Cure.

Such Deacon must publickly read the 39 Articles in the Parish Church to which he is admitted, and declare his Assent thereunto, and must subscribe the same in the Presence of the Ordinary.

A Priest must be 24 Years old before he can be admitted to Preach, or to administer the Sacraments; and he must bring a Testimonial of Four Persons, known to the Bishop, of his Life and Doctrine, and must be able to give an Account of his Faith in *Latin*.

Besides, no Person is to be admitted into a Benefice with Cure, &c. of 30 l. *per Ann.* and in the Queen's Books, unless he is a Batchelour in Divinity, or a Preacher lawfully allow'd by some Bishop, or one of the Universities, and all Admissions to the contrary are void.

There are some Canons which relate to this Matter, which were confirmed by Letters Patents of King James I. which are as follows:

The 33d Canon takes Notice that it was long before that time provided by the Decrees of the Church, and the ancient Fathers, that none should be admitted to the Order of a Deacon, or Priest, who had not some certain Place where he might officiate; and in Conformity to those Decrees that Canon requires,

That no Person shall be admitted into Orders, except he produces a Presentation to the Bishop of some Ecclesiastical Living, then void in his Diocese, and bring a Certificate that he is provided of some Church, or of some Minister's Place vacant, either in a Cathedral, or Collegiate Church; or that he is Fellow, or Chaplain in some College, either in Oxford or Cambridge; or Master of Arts of Five Years standing in the University, and living there at his own Charge;

(k) 2 Inst. 344. (l) 13 Eliz. cap. 12.

or unless the Bishop himself shortly intends to admit him to some Benefice, or Curacy.

Under these Qualifications, and these Terms, a Person may be admitted to a Living; and there is a Penalty inflicted upon the Bishop, for admitting any one contrary to this Canon; and that is, *to maintain the Person so admitted, until he prefer him; which if he refuse, he may be suspended by the Arch-bishop, being assisted with another Bishop, from giving Orders for a whole Year.*

By the 34th Canon, the Bishop is prohibited to admit any Person into Orders, if he doth not dwell in his own Diocese: 'Tis true, he may admit one who lives in another Diocese; but then such Person must be of one of our Universities, or he must bring Letters Dimissory from the Bishop in whose Diocese he lives, or a Testimonial of his good Life and Conversation, under the Seal of some College or one of the Universities, or of Four Ministers, together with the Subscription and Testimony of other credible Persons, who have known the Person for Three Years.

By the 35th Canon the Bishop is to examine the Clerk before Admission; but if he is admitted without any Examination, either by the Bishop, or by Three Ministers appointed by him, in such Case the Bishop may be suspended by the Arch-bishop, as aforesaid, from conferring Orders for Two Years.

The chief Reason of this Examination is, that the Bishop may be satisfied the Person is qualified, *tam scientia quam moribus*:

Now as to his Knowledge, since the Scriptures were originally written in the Hebrew and Greek Tongues, it seems necessary that every Minister should understand those Languages. I have the Authority of a whole Synod for what I write, which was held at Harlingen in Friesland, Anno 1624. it was then decreed by them, that *In posterum Theologiae candidati, quotquot ad examen Ministerii Ecclesiae admitti desiderabant, præter Testimonia Senatus Academici & Theologiae Professorum, exhibeant etiam Testimonia Professorum Ebraea & Graecæ Linguae, quibus doceant se in prædictis Linguis eos saltem progressus fecisse, ut originalem Veteris novique Testamenti Textum mediocriter possint intelligere, utque in Classe ista, cum examini se offerunt, ejus quoque rei specimen edere teneantur.*

But Admission with us is no more than an Allowance, or Approbation of the Bishop, that the Clerk presented to him is capable of performing his Office; and this is a Right vested in the Bishops, ever since the Parochial Clergy were establish'd here. This appears by some of the Canons collected by Archbishop Egbert, who died Anno 766. that Priests should not be plac'd in any Church *sine Auctoritate & Consensu Episcoporum.*

'Tis true, Mr. Selden in his History of Tythes tells us, that this Method of presenting a Clerk to the Bishop was introduc'd here, Anno 1200. by the Canon Law, but our
* Historians

* Historians give us another Account of it ; for when Gregory the 9th, who was Pope 16 Years afterwards, attempted to encroach upon our Nobility by Papal Provisions, they all join'd in a Remonstrance to him, importing, that from the first planting of Christianity here, the Patrons of Churches, upon the Death of Incumbents, presented their own Clerks to the Bishops to fill the Vacancy : And because the Law hath made him a Judge of the Capacity and Fitness of the Person, therefore an Action on the Case will not lie against him, if he refuse to admit him thus qualified, according to the Canons ; but the Remedy was by the Writ, *Quare non admisit* ; or, *ad admittendum Clericum*, which may be brought in that County (*m*) where the Refusal was, and not where the Church is, because the Refusal is the Ground of the Action.

But the Clerk could not be admitted, if he obtained Judgment, because Damages were only to be recover'd in these Actions.

Now the first of these Writs was never brought, but when the Advowson was recover'd, upon a Writ of Right of Advowson, and then the Bishop had refus'd to admit ; and the other was always brought after the Plaintiff had recover'd the next Presentation, upon an Assize of Darreign Presentment, which Proceedings are now antiquated, and a quicker Remedy by *Quare impedit* is now in use.

Now as the Law hath given the Bishop Power to admit under these Qualifications, so it hath prohibited him to admit (*n*) *Aliens* and *Frenchmen* ; the Reason may be, as my Lord Coke observes, upon the Statute *De asportatis Religioforum*, because *Aliens* and *Frenchmen* had got the greatest Part of the Possessions of the Kingdom, and this might be a Restraint upon them from getting more.

But some are of Opinion, that these Statutes, mentioned in the Margin, being made in Time of War between these Nations, are not in Force at this time ; for we see *Aliens* are admitted to Benefices. And tho' my (*o*) Lord Coke, upon Consideration of those Statutes, was of Opinion, that they ought not to be admitted ; yet in *Calvin's Case* he tells us, that not only an *Amenatus* born in *Scotland*, before the Union ; but an *Alien*, born in *Spain*, is capable of a Benefice in *England*, and may maintain an Action for any thing concerning the Possessions of the Church, as Priors (*p*) *Aliens* might have done, because the Action is not brought in his own Right, but in his Politick Capacity, and in the Right of the Church.

Now if he is capable of a Benefice, I see no reason why the Bishop should refuse to admit an *Alien*.

* Matt. Paris 513. (*m*) 7 Rep. 3. (*n*) 3 R. 2. cap. 3.
 7 H. 4. cap. 12. 1 H. 5. cap. 7. 2. Inst. 583. (*o*) 4 Inst.
 138. (*p*) 1 Inst. 129.

'Tis true; no Action on the Case lies against the Bishop, for refusing to admit, for the Reason abovemention'd; but if he admits, and the Arch-deacon refuses to induct, an Action on the Case lies against him, because Induction is a temporal Act.

This was made a Question by *Fitzberbert*, (q) because the Arch-deacon might have something to alledge for his Refusal, which might be cognizable only in the Spiritual Court; but 'tis not doubted now, but that such an Action will lie; and I see no Reason why it should not, as well as an Action against a Sheriff, for refusing to give Possession upon an *Habere Facias Possessionem*, for in this Respect an Arch-deacon may be called an Ecclesiastical Sheriff.

I shall now shew what hath been allow'd by our Law to be good Causes, for a Bishop to refuse Admission to a Clerk presented by the Patron.

And first 'tis generally held, (r) that whatever are good Causes of Deprivation, are likewise sufficient Causes to deny Admission; as Incontinence, Illiterature, Perjury, Heretick, Bastard, Outlawed, Drunkenness, a Layman, &c. all which you may see more at large in Title *Deprivation*.

In 39 Ed. 3. 1, & 2. the Bishop refused to admit, and in a *Quare impedit* brought against him, he pleaded that the Clerk was *Persona inhabilis* to have a Benefice.

In the very next Year another Bishop (s) pleaded to the like Action, that the *Presbiter* was not sufficiently Lettered, and *Et ratione inhabilis*, and both these Pleas were allowed to be good, tho' the Matter was very general.

So (t) *Persona in literatura minus sufficiens seu habilis ad habend' aliquod beneficium Sanctæ Ecclesiæ*;

So is *Criminosus* generally & *non de sana Doctrina*.

So is *Perjurus*; Pas. 6 Eliz. Rot. 714. *Paschal vers. Ep'um*, London.

So is *Simoniacus*; (u) tho' in Relation to any former Benefice, and not to that which he desires now to be admitted.

So in a very late Case (x) the Bishop of *Excester* refused to admit a Person to a better Living, because he was *In Literatura insufficiens*, & *ea ratione inhabilis*, & *minime idoneus ad habend. Ecclesiam cum cura animarum*.

'Tis true; the Courts in *Westminster-Hall* held this to be uncertain, and to be a very loose way of pleading, and therefore gave Judgment for the Plaintiff in the *Quare impedit*, which was affirmed upon a Writ of Error in the Queen's Bench, but the Judgment was revers'd in the House of Peers.

(q) N. B. 47. (r) 2. Inst. 631. (s) 40 Ed. 3. 24. (t) 15 & 16 Eliz. Rot. 1941. *Molineux vers. Arch-bishop of York*, Hill. 6/ Eliz. Rot. 646. *Bodenham vers. Ep'um Hereford*. (u) 2 Roll. Abr. 356. (x) Hill. vers. Ep'um *Excester Cases* adj. 88.

So that all these Causes abovemention'd are now good Causes of refusal to admit a Clerk to a Benefice, and they are such which relate to his Person; but if there is no Incapacity in the Presentee, the Bishop may refuse to admit him, for some Causes relating to the Patron, as if he is excommunicated, &c.

So if there are Three Jointenants of an Advowson, (y) or of the next Avoidance, and Two of them present a Clerk to the Bishop, he may refuse to admit him till they all joyn in the Presentation, unless these two present the third Jointenant, and then the Bishop must admit him, because he may relinquish his Title, and he cannot joyn with the other two, in order to present himself.

But these Causes following are not sufficient for the Bishop to refuse the Clerk, as to alledge that he is a Frequenter (z) of Taverns, or a Player at unlawful Games, because these Acts do not make the Man *Criminosum*, they are only *Mala prohibita* to some Persons, and at certain Times, but are not *Mala in se*.

The Bishop refused to admit a Clerk, (a) because he was *Schismaticus inveteratus*; this was held to be uncertain, and that he ought to set forth the special Cause; for if Schism is a Breach of that Communion wherein a Man might have continued without Sin, then 'tis groundd upon some particular Opinion or Notion to the contrary, which might have been set forth that the Party might traverse it:

'Tis no Cause to refuse a Man because he hath another * Benefice, for that is at his own Peril; but in such Cases the Second is usually better than the First, which the Parson accepts, and so the First is void.

Adultery.

THIS is *Illicitus concubitus conjugati & conjugatae*, which was a Crime before it was forbidden by the positive Law of *Moses*, for it is contrary to the Law of Nature; and yet some of the Fathers, and particularly *St. Chrysostome*, have commended the Prudence of the Patriarch *Abraham*, who expos'd his Wife to the Adulterous Embraces of *Abimelech*, which he might easily have prevented by telling him the Truth, that she was his Wife and not his Sister.

All Nations have agreed to inflict severe Punishments on Criminals of this Nature, tho' they differ in the Manner, for amongst the *Jews* both the Man and Woman were punish'd with Death, either by stoning, or by strangling, the last of which was accounted the easiest Death; and where the particular Manner was not determined by Law, there the *Rabbins* tell us *ampliandi sunt favores*.

(y) 26 Rol. Abr. 355. (z) Dyer 254. 2 Rol. Abr. 355.
(a) 5 Rep. 58. *Specot's Case*. * 2 Rol. Abr. 555.

Therefore

Therefore when (a) *Moses* told the Children of *Israel* that the Man and Woman should be put to Death, it was usually by *Strangling*, tho' the (b) Prophet *Ezekiel* mentions *Stoning*, and so did the Pharisees, when they brought a (c) Woman convicted of Adultery before our Saviour, declaring to him what the Law of *Moses* was in such Cases, thinking that he would have acquitted her contrary to that Law; however the Punishment was still by Death.

'Tis probable the like Punishment was inflicted by the *Greeks* on Offenders of this Nature, for (d) *Mr. Beger* mentions an ancient Medal, coined by the Inhabitants of an Island in the *Aegean Sea*, where Justice was strictly administer'd, having two Faces on one Side, and an Ax on the other, which signified the capital Punishment of a Man and Woman convicted of Adultery.

Amongst some Pagans the usual Punishment was by Castration, to which (e) *Horace* seems to allude;

¶ *Accidit ut cuidam testes caudamq; salacem
Demeteret ferrum:*

There are two Instances of this Kind of Punishment in (f) *Valerius Maximus*: 'tis wounding Lust in the most sensible Part, and 'tis an effectual Remedy to prevent the committing the like Fault again, which no other Punishment will do that is not capital.

Therefore (g) *Martid* laugh'd at that Husband who cut off a Man's Nose whom he found in Bed with his Wife, telling him she was no Loser by it; but another (h) Poet exercising his Fancy on a Husband under the like Circumstances tells us, that in his Fury

*Distringit gladium, machæ duo Brachia findit,
Atq; duos machi dissecat ense Pedes;
Non sic debuerat facinus punire nefandum,
Pars quæ peccatum est hæc refecunda fuit.*

The *Romans* preferr'd Death before it; this appears in the Case of those Merchants which (i) *Cæsar* represented to the Ambassador of *Pharmaces*, and who had undergone that Punishment in the Kingdom of *Pontus*.

But in the Reign of the last of the Roman Kings they had a very odd Punishment for Adulterers, which was by thrusting a large Raddish into their Bowels, and if that could not be had,

(a) 20 Lev. 10. (b) 16 Ezek. 34. 40. (c) 8 John 5. (d) Obs. in Numis. fo. 61. (e) 2 Satyr. lib. 1. (f) Lib. 6. Cap. 14 N^o. 13. (g) Lib. 3. Epigr. 85. (h) Vultei Epig. lib. 2. fo. 136. (i) Hist. de Bello Alex. 411.

then by thrusting up a Fish with a large head; this appears by *Catullus*, who liv'd at that time :

¶ *Ah tum te miserum, malig; fati,
Quem attraxit pedibus, patente portâ,
Percurrent saphanique, mugilesque.*

Staliger, who wrote a Comment on that Poet, takes no Notice of it, but *Juvenal* alludes to it in his tenth Satyr,

———— ¶ *Quosdam mæchos & mugilis intrat.*

The *Lex Julia*, which was made in the Reign of *Augustus Caesar*, punish'd Adulterers with Death; tho' || *Brissotius* is of a contrary Opinion, yet I believe that Punishment was not long in use among those People, for * *Seneca*, who liv'd in the Reign of *Nero*, tells us, that *Pudorem rei tollet multitudo peccantium, numquid jam ullius Adulterii pudor est, postquam eo ventum est, ut nulla virum habeat, nisi ut Adulterum irriset, &c.* And *Juvenal*, who wrote in *Domitian's* Reign, exclaims,

———— *Ubi nunc Lex Julia dormis :*

But as soon as the Empire became Christian the Punishment was again by Death, this is allow'd by *Brissotius*; tho' I find that in succeeding Reigns that Punishment was mitigated as to the Women, for they were condemn'd to live in little Cells, and to prostitute themselves to all Comers, who were oblig'd to wear little Bells at that very time, that the People passing by might hear what they were doing; this was a horrid Custom, and therefore justly abolish'd by the Emperor *Theodosius*; but many Years afterwards the Emperor *Justinian* condemn'd such Women to be whip'd and shut up in Nunneries.

In the barbarous Age of our British Ancestors this Crime was as common among them as it was amongst the Romans; for when the Emperor *Severus* came hither, a Lady of Quality, who accompanied him, observing the British Women to communicate their Favours to Men without any manner of Shame, and rebuking one for it, she replied, ¶ *We publicly bestow those Favours on the bravest of Men, when you Roman Ladies lie secretly with the basest of Mankind :* † *Xiphiline* mentions this Answer of the British Lady, upon the Account of that Law which that Emperor had made against Adultery, which could never be put in Execution, because the Multitude of Criminals made it impracticable for the Courts to hear all their Trials : This must be intended of the Ecclesiastical Courts, for Adultery at that time was accounted a spiritual Offence, not from its Nature, for 'tis no more a spiritual Crime than Murder, for both are Offences against the second Table; but from the Quality of the

|| *Brison. ad legem Juliam de Adulter. 150.* * *De Benefic. lib. 3. cap. 16.* † *In Severo fo. 343.*

Persons who are made Judges of it, and those are Bishops who obtain'd this Jurisdiction after this manner.

When Emperors became Christians, those Bishops, who were instrumental to their Conversion from *Paganism*, were in so great Reverence, that they granted them a Power of Judicature in certain Cases, whereof Marriage was one; because that was always solemnized in the Face of the Church, where the Bishop or his Ministers did preside.

And because matrimonial Causes were subject to their Jurisdiction, it seemed reasonable that the Violation of Marriage should be so too.

But the Bishops (a) for a long time did not govern themselves in this Matter according to the Canons of the Church, but pursuant to the Rules of the *Imperial Law*; and this appears by the Punishment of this Offence, which by that Law was Death; for our *Saxon Ancestors* compell'd the Adulterers to strangle her self, and he who debauch'd her was to be hanged over her Grave; King *Edmond* punished an Adulterer in the same manner as he did Homicide; and by an Ordinance of King *Canutus*, the Man was to make the injur'd Party such Satisfaction as the Bishop should enjoin, and then he was to be banished: But if it was a Woman who had offended, her Nose and Ears were to be cut off; but I never read that any Woman was thus punish'd.

By the Laws of *William the Conqueror*, (b) the Adulterers was to be put to Death. And *Bracton*, an old Writer of the Law, tells us, That since the Woman was to undergo the Punishment abovementioned, it was but reasonable the Man should be punish'd, not with Death, but *In eo Membro quo deliquit*: And accordingly *John Britton*, (c) in the Reign of *H. 3.* punished one *Jessery Miller* of *Norfolk*, for debauching his married Daughter; but the King was angry, and banish'd *Britton*, and issued forth a *Proclamation*, that no Man should presume to do the like, unless it was in the Case of his Wife.

The aforesaid *William the Conqueror* not only altered the Punishment for this Offence, but took a way this Jurisdiction from the Bishop's Courts; especially in Cases where either his Servants, or those who held of him *in Capite*, were concerned; for he prohibited the Bishops without his Leave to excommunicate, to implead, *Vel ullâ aliâ Ecclesiastici rigoris penâ constringere Barones vel Ministros suos Adulterio denotatos*, and the Offenders were afterwards tried in the *Leet*, (d) which is a temporal Court, and upon Conviction were fined; which was always paid into the Exchequer, except the Offence was committed in *Kent*, where the Archbishop resided, and then he had a share of the Fines; that is, if the Man was the Offender, then

(a) Eadem 6, (b) Seld. on Eadm. 185, lex, 37, (c) Seld, Janus 35, (d) Spelm. gloss. in verbo,

the King had his Fine; but if a Woman, then it was paid to the Archbishop.

But in many Places, (e) Lords of Mannors had a Privilege to punish their own Servants offending in this Nature, within particular Limits, and the Fines were paid to them; and this may be the Reason why both the Temporal and Spiritual Courts took Cognizance of this Offence by Turns,

I do not find that there was any Strugling between these Courts so long as the Punishment was Capital; but when once it came to be Pecuniary, and expiated by a Fine, then as the Power of the Pope prevailed here, so the Spiritual Courts claimed this Jurisdiction, and had it; but when there was a Prince upon the Throne, that had Courage enough to stand against him, then the Temporal Courts reassum'd this Judicature: But in this Contest the Clergy obtained that neither they or their Causes should be brought before any Secular Judicature; and being sure to find Favour in their own Courts, a small Fine did not discourage them from committing this Offence.

And thus it stood till the Reign of *H. 7. cap. 4.* when the Papal Authority began to be a little diminished; for this there was a Law made, that the Ordinary shall punish Priests and Clerks, and religious Men for Incontinency, by *Imprisonment*, according to the Quantity and Quality of their Trespass, for so is the Phrase in that Law; and this we are told, by the Preamble of that Act, was for their more *sure Reformation*.

But the reformed Divines were more severe; for I find that about two Years after *Calvin's* Death, one *Spifame* was beheaded at *Geneva* for keeping a married Woman; and *Thuanus* tells us, that not many Years after that Execution, a Protestant Governor of *Orleans*, in the Reign of *Car. 9.* put a Man and Woman to death for this Crime; but it was thought to be a great Innovation, and that Persons of the first quality in *France* were not ashamed to say, that if there was nothing else in the Reformed Religion, they would not embrace it, because of so great a Severity for this Offence; which may be a reason for the Mitigation; for tho' the Divines of **Stratzburgh*, about the beginning of the last Century, had prevailed on the Magistrates to inflict a Capital Punishment on Adulterers, yet those of the Low Countries and other reformed Nations had not shewn the like Zeal against those Criminals, nor so much as they did against Dancing; which seems to be another extream.

With us here in *England*, tho' the Punishment was sometimes directed by the Temporal Laws, (f) yet the Spiritual Courts took Cognizance of the Trial in these Cases, to which it belong;

(e) Spelm. gloss. in verbo *Laerwitt.* 2 Inst. 433. * Schoo-
kuis Exercitat. 16 pag. 321. (f) Jones 259.

eth at this very Day; and there is a Canon (g) enjoining the Church-Wardens to present those to the Bishop who offend their Brethren by Adultery.

I will not affirm, but it is very probable, that since the Spiritual Courts have a Jurisdiction in Cases of Adultery, therefore the common Law did not punish an Adulteress with the Loss of her Dower; but this is now remedied by the Statute W. 2. (h) viz. That if the Woman wilfully leaves her Husband, and lives with the Adulterer, she shall be barred of her Dower, unless the Husband freely forgives her, and she cohabits with him again.

My Lord Coke (i) mentions a very strange Case, which he tells us was the first Judgment given upon this Branch of that Statute, and it was thus;

Sir William Paynell married the Widow of John C., and in her Right brought a Writ of Dower, to which was entituled by the death of her former Husband.

The Defendant pleaded an Elopement, and that she lived as an Adulteress with the Demandant.

He replied, that her Husband granted her to him, by Deed executed in his Life-time, *Virtute cujus non vixit ut adultera* with the Demandant Sir William Paynell, but as his Wife; and upon Demurrer to this Replication, Judgment was given against him.

As it was the first Judgment given upon this Statute, so 'tis the first and only Instance of a Wife which was granted by Deed: 'Tis true, it was adjudged to be against Law, otherwise we should have met with many more Grants of the same Nature.

Lyndwood tells us, That a Person convicted of Adultery is *ipso facto* deprived; but he is of Opinion, that there ought to be a Declaratory Sentence in the Ecclesiastical Court; (k) but if the Person thus deprived should be pardoned, then he is restored without Suit, because those Courts cannot determine the Validity of a Pardon.

Adultery is likewise a sufficient Cause of Divorce, but then it must be proved by Witnesses, and not by Confession of the Guilty Party, which see in Title Divorce; and lastly, by the Civil Law 'tis a forfeiture of a Legacy bequeathed by the Husband to his Wife.

Admowson.

WHETHER this Kingdom was divided into Counties by King Alfred, or before, 'tis not material here to enquire; tho' Mr. Selden (l) was of Opinion, that it was long before: But be it as it will, as soon as the Land was thus divi-

(g) Can. 109. (h) W. 2. cap. 34. 2 Inst. 453. (i) 2 Inst. 435. (k) Hob. 213. Cro. Eliz. 41. 789, (l) Seld. Tit. Hon. 309.

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eth at this very Day; and there is a Canon (g) enjoining the Church-Wardens to present those to the Bishop who offend their Brethren by Adultery.

I will not affirm, but it is very probable, that since the Spiritual Courts have a Jurisdiction in Cases of Adultery, therefore the common Law did not punish an Adulterers with the Loss of her Dower; but this is now remedied by the Statute W. 2. (b) viz. That if the Woman wilfully leaves her Husband, and lives with the Adulterer, she shall be barred of her Dower, unless the Husband freely forgives her, and she cohabits with him again.

My Lord Coke (i) mentions a very strange Case, which he tells us was the first Judgment given upon this Branch of that Statute, and it was thus:

Sir William Paynell married the Widow of John Camm and in her Right brought a Writ of Dower, to which she was entitled by the death of her former Husband.

The Defendant pleaded an Elopement, and that she lived as an Adulteress with the Demandant.

He replied, that her Husband granted her to him, by Deed executed in his Life-time, *Virtute cuius non vixit ut adultera* with the Demandant Sir William Paynell, but as his Wife; and upon Demurrer to this Replication, Judgment was given against him.

As it was the first Judgment given upon this Statute, so 'tis the first and only Instance of a Wife which was granted by Deed: 'Tis true, it was adjudged to be against Law, otherwise we should have met with many more Grants of the same Nature.

Lyndwood tells us, That a Person convicted of Adultery is *ipso facto* deprived; but he is of Opinion, that there ought to be a Declaratory Sentence in the Ecclesiastical Court; (k) but if the Person thus deprived should be pardoned, then he is restored without Suit, because those Courts cannot determine the Validity of a Pardon.

Adultery is likewise a sufficient Cause of Divorce, but then it must be proved by Witnesses, and not by Confession of the Guilty Party, which see in Title Divorce; and lastly, by the Civil Law 'tis a forfeiture of a Legacy bequeathed by the Husband to his Wife.

Adwolson.

WHETHER this Kingdom was divided into Counties by King Alfred, or before, 'tis not material here to enquire; tho' Mr. Selden (l) was of Opinion, that it was long before: But be it as it will, as soon as the Land was thus divi-

(g) Can. 109. (b) W. 2. cap. 34. 2 Inst. 453. (i) 2 Inst. 435. (k) Hob. 213. Cro. Eliz. 41. 789. (l) Seld. Tit. Hon. 509.

ded, the Kings of *England* began to build Churches; and in a little time other great Persons, in Imitation of them, did the like upon a Parcel of their own Demefnes, and endowed those Churches with Lands belonging to their Mannors.

When a Church was thus built and consecrated, it was no longer any Man's Property; but yet there was a Power reserved in the Founder to bestow it upon a fit Person, which was afterwards called the Right of Advowson; (*m*) and this was no more than in his own Name, to present such Person to the Bishop upon a Vacancy; and the Founders in a religious Zeal, which was fervent in those Days, always appointed Advocates to defend the Rights of their Churches in any Courts; and this afterwards became an Honorary Title.

So that by degrees, those who gave the Ground on which Churches were built, and the Founders, and those who endowed them when built, (*n*) were called Advocates, or Patrons; and the Right which they had to present was called the Right of Advowson; not as some Men would have it, because the Patron *Advocat alium* to supply the Vacancy, but because he was bound to protect and defend the Church from Oppression and Violence.

An Advowson, as it standeth in our Law, is } Appendant
or
} In Gros.

Under which Division I shall shew,

- I. To what an Advowson is properly Appendant, and to what not,
- II. I shall shew it to be a Temporal Inheritance.
- III. By what Words it passeth in the Case of the Queen, and of a common Person.
- IV. What Acts make an Advowson in Gros, and what not.
- V. I shall mention something concerning the Forms of Pleading these Cases.

I. As to the First of these, all Advowsons to which common Persons had any Right were originally appendant to Mannors; because the Church itself was built on those Lands which were Parcel of the Manor, and the Right of Patronage, or the *Jus honorificum*, as the *Civilians* call it, came from the Endowment out of such Lands, and there never was any Advowson in Gros till Appropriations were made.

Now, tho' 'tis commonly said that an Advowson is appendant to a Mannor, yet in Truth 'tis appendant only to the Demefnes, (*o*) because those are of perpetual Substance, whereas Rents and Services are likewise Parcel of a Mannor; but an Advowson cannot be appendant to them, because they may be extinguished.

(*m*) ; Inft. 17. b.

(*n*) ; Inft. 119. b.

(*o*) ; Inft. 122.

Such Appendances are always by Prescription, tho' the Advowson it self is not always Appendant; for it may be so at one Turn, and in Gross (p) at another, as if the Mannor is in Coparcenary; the Advowson to which 'tis appendant must be so too, and by Consequence 'tis in Gross; but yet in each of their Turns, 'tis appendant to that which they have.

As to the Advowson of a Vicaridge, (q) 'tis appendant to the Rectory of common Right, and yet it may be likewise appendant to a Prebend, or to a Mannor; (r) as in Case the Rectory it self, before it was appropriated, was appendant to the Mannor; and if Issue should be joined, whether 'tis so appendant or not, if it can be proved, that all those, &c. who had the Mannor, had nominated the Person, and that the Abbot presented the Nominee to the Bishop; this is good Evidence, that it is appendant to the Mannor, because the very Nomination is the Substance of the Advowson it self.

II. This being a real Right vested in the Patron by the common Law, is by that means, and by reason of the Appendancy, become a Temporal Inheritance, because the Mannor to which 'tis appendant is Temporal.

'Tis properly *Hereditas incorporata*, but it doth not pass by Livery, because it doth not lie in manual Occupation; yet upon a *Grand Cape* in a Writ of Right of Advowson, the Sheriff (s) may return *Quod cepit advocacionem in manus suas*; for there may be a legal, tho' not an actual Possession of an Advowson; it may be Assets in the Hands of an Executor; a Widdow may be endowed of it, and a Husband may be Tenant by the Curtesie; a Fine may be levied, or a Common Recovery suffered of it; it may be forfeited upon an Attainder of Felony, and it may be lost by Usurpation and Plenarty of six Months, by Recusancy, Outlawry or Lapse; all which shew that 'tis a Temporal Inheritance: Besides, it may be granted by Deed, or devised by Will; and therefore where an Incumbent purchased the Advowson in Fee, and devised that his Executor should have the next Presentation, and then devised the Inheritance to another; this was a good Devise of the next Avoidance, tho' it was of a thing in Action, and not properly devisable, 2 Cro. 371.

III. In the next Place, I shall shew by what Words an Advowson passeth. At Common Law, if the King had granted a Mannor, *Cum Pertinentiis*, the Advowson had certainly passed by those Words; but by the Statute, *De Prærogat Regiæ*, (t) 'tis enacted, that it shall not pass without special Words; and yet in some Cases the Law is otherwise, as where the Advowson of a Vicaridge is appendant to a Rectory; and the Queen, upon an Attainder of Felony, grants the Glebe and Tyths of the

(p) 8 Rep. Wiatt. Wild's Case. (q) Moor 894. (r) Hob. 303. Winch. Entr. 810. (s) 2 Rol. Rep. 469. (t) 17 Ed. 2. cap. 15.

Rectory by special Words, and then generally grants *Omnia Tenementa* (u) Parcel, and belonging thereunto, *Adeo plene, &c. prout*, the said Felon had it. In this Case the Advowson of the Vicaridge passes to the Grantee, by these Words, *Adeo plene, &c.* because the Queen should not be deceiv'd in her Grant,

But if she had granted the Rectory, *Cum pertinentiis ac etiam vicariam Ecclesia*, the Advowson of the Vicaridge would not pass, neither in her Case, nor in the Case of a Common Person; but if she had granted *Ecclesiam suam* (x) it might have been otherwise, because by such Grant (it was my Lord Coke's Opinion) the Advowson passes. If she grant a Mannor, to which an Advowson is appendant, † *Una cum advocacione*, the Church being then void; yet she shall present *Pro hac vice*, because the Avoidance was actually vested in her before the Grant made, and will not pass by the word *Advocatio*.

The Queen had the Advowson of the Vicaridge of B. and she granted the Vicaridge to C. (y) The Advowson doth not pass, for that is not the Advowson, and every thing must pass by proper Names.

So where an Advowson (z) was appendant to a Mannor, and two Parts of the said Mannor were seized by the King for Re-cusancy, and then by Letters Patents he demised those two Parts with the Appurtenances, and all Profits, Commodities and Advantages to the same belonging. The Advowson did not pass by these general Words, as my Lord Hobert tells us; (a) and yet in another Place 'tis said, that if the Word *Hereditament* is in the Grant, the Advowson will pass.

But my Lord Dyer (b) was of a contrary Opinion, that it did not pass by that Word; and the Reason may be, because an Hereditament properly signifies an Inheritance; out of which a Rent may be reserv'd, which cannot be out of an Advowson, for it doth not consist in Manual Occupation, as aforesaid; and therefore, if a Bishop hath an Advowson appendant to a Mannor, which he enjoys in the Right of his Bishoprick, and he demises it for 21 Years, this is good during the time he continues Bishop there; but it will not bind his Successor, because 'tis not an *Hereditament*, out of which a Rent may be reserv'd; and so 'tis void against the Successor, by the (c) Statute.

IV. As to Advowsons in Gross, I shall give some Instances what Acts makes them so, and what not.

And First, If 'tis granted by it self, then 'tis separated from the Mannor, and becomes in Gross.

If one (d) Acre of a Mannor is granted away, to which an Advowson was appendant; and in the same Deed the Advow-

(u) Dyer 350. b. 10. Rep. 63. b. (x) 1 Leon. 191. 1 Rol. Rep. 237. † Moor. 249. Owen 53. Goldf. 73. 3 Leon. 196. (y) Cro. Eliz. 163. (z.) Hob. 126. (a) Hob. 303. (b) Dyer 323. (c) 1 Eliz. cap. Cro. Eliz. 69. (d) Dyer 48.

son is likewise granted, 'tis no longer appendant, but in Gross; because 'tis not beneficial for the Grantee that it should be so.

An Usurpation and Plenarty for six Months (e) severs all Advowson from the Mannor, and makes it in Gross in the Case of a Common Person, but 'tis not so in the Case of the Queen; for tho' she may be dispossess'd of her Presentation by this means, yet she may grant the Advowson, notwithstanding such Usurpation.

But a wrongful Collation will not make any Disappendency, or binding Plenarty against the true Patron.

And as 'tis in Gross, (f) so 'tis entire, and cannot be divided into Parts, so as to be held in Severalty, as if a Fine should be levied of a Mannor to which an Advowson is appendant, and a Third Part both of the Mannor and Advowson is render'd back to A. for Life; another Third Part to B. for Life; and another to C. for Life, with divers Remainders over; notwithstanding this Division, they are all Tenants in Common of the Advowson; and if they cannot agree to present, the Bishop must do it by Lapse.

But yet a Man may be seiz'd of the Advowson of two Parts of a Church; for there may be several Portions in one Church, to which several Patrons may have a Right to present, as the Place may require.

V. *Lastly*, As to the pleading in those Cases, 'tis always set forth that the Plaintiff was seized as of Fee; and it must not be in his Demesne as of Fee, because an Advowson is not properly a Demesne; for 'tis an incorporeal Inheritance, as hath been already observ'd.

In Cases (g) of Appendency, if the Plaintiff sets forth that the Advowson was *appendant*, &c. and that he did *present* to the Church as appendant there, the Defendant may either traverse the *Appendency*, or the *Presentation*; for tho' the Advowson was appendant, yet if the Plaintiff did not present, he had lost his Title.

But if he had not set forth a Presentation by *Vertue of the Appendency*, but only in general, that he was seized of the Mannor to which the Advowson was appendant, and that he presented such a Clerk; there the Presentation must be travers'd, and not the *Appendency*; because notwithstanding the *Appendency*, the Presentation might have been by Usurpation.

Alimony.

THIS Word, in a legal Sense, signifies that Proportion of the Husband's Estate, which by the Sentence of the Ecclesiastical Court is allow'd to the Wife for her Maintenance, upon any Separation from him, which is not caused by her Elopement or Adultery.

(e) Gawdy vers. Ep'm. Cantur. Hob. (f) Godb. 128. 2 And. 21. (g) Vaugh. 15. 'Tis

'Tis properly cognizable by the Ordinary, (b) and by no other Court: 'Tis true, there lies an Appeal, but still to an Ecclesiastical Judge; and if the Person convicted will not obey the Sentence, he may be Excommunicated.

Formerly, when the high Commission Court was in being, they took Bond in the Name of one of the Doctors to allow the Woman Alimony, and for the Husband to use her as his Wife; and if the Party refus'd to enter into such Bond, that Court hath committed him; but my † Lord Coke affirm'd this to be illegal, for they have not Power to take such Bond, nor to commit upon refusal.

By the Civil Law, notwithstanding the Elopement of the Wife, yet her Husband must allow her *Alimony, Pendente lite*.

The Form of proceeding in such Case is thus: The *Proffor* alleges, that the Parties were married, and prays that the Man may be condemn'd *In expensis litis & alimonia*; this appearing to be true, the Judge condemns him accordingly.

Then the *Proffor* gives him a Bill of Costs, and at the Bottom writes thus, (*viz.*) *Petit pars dicta B. sumptum alimoniae*, from the Time of the Citation, *Durante lite juxta ratam* of so much per Week, leaving a Blank for the Judge to insert it *Usque finem litis*.

Then he taxes the Costs, and being certified of the Abilities of the Man, he taxes so much for Alimony, weekly, &c. *Nisi aliter per nos decretum erit*, and the usual Sum is the Third, or at least the Fourth Part of the yearly Value of the personal Estate of the Husband.

This is not very Beneficial, because 'tis not a final Sentence, and by the Form of it 'tis absolutely in the Power of the Judge to alter it; for 'tis *Nisi aliter decretum erit per nos*, whereas the Judgments in the Temporal Courts are more strict, (*viz.*) *Nisi causa ostensa fuerit in contrarium*, &c.

But in these Cases of *Alimony*, if the Wife voluntarily depart, and afterwards repents, and submits, and desireth to cohabit with her Husband, and he refuses, then he must allow her *Alimony*; but if her Departure was occasion'd by him, *Propter sevitiam*, and he shall offer sufficient Security for his good Behaviour to her, and she refuses to return, he shall not allow her *Alimony*. And yet if the Spiritual Court (i) should decree it in such Case, the Party is without Remedy; for the Temporal Courts will not grant a Prohibition, because the Ordinary is the proper Judge, both of the Security and Reconciliation.

Altarage.

THIS *ex vi Termini* signifies the Profits which the Priest had by Oblations at the *Altar*; for when the Mother-Church was appropriated to a religious House, (k) the Obla-

(b) 1 Rol. Rep. 110. Cro. Car. 220, March, 80, † 1 Rol. Rep. 110. (i) 2 Cor. 364. (k) Still. 175. tions

tions made in the Chappel of Ease did not belong to the Convent, but to the Parson who officiated at the *Altar*, and from thence it was call'd *Altarage*.

'Tis a Word which was generally inserted in the Endowment of a (1) Vicaridge; thus we read a Parsonage was appropriated *Salva vicaria quæ consistit in altaragio & in minutis Decimis totius parochiæ*; and in a larger Sense, 'tis a Word which comprehends all the small Tythes which the Vicars had for their Maintenance; but then there must be either some Custom or Usage to make it so extensive.

In the Case of † *Turner* and *Andrews*, 21 *Eliz.* in the *Exchequer*, by a Composition for the Profits assign'd for the Vicar's Maintenance, he was to have *Altaragium cum manso competentis*, by which Words all small Tythes were comprehended.

So in the Common Pleas (m) *Anno. 4 Car.* Dr. *Wood* against *Greenwood*. There was a Composition, that the Parson should have the Tythe of Grain and Hay, and the Vicar should have *Altaragium*; and the Question was, if the Vicar should have the Tythe of Underwood, by Vertue of that Word; it was held, that if ever any such Tythe had been paid to him, it should be paid still.

The same Case is reported in *Hetley*, Word for Word. 'Tis true, *Wood* is not due to the Vicar, but by Prescription or Usage; because 'tis great Tythe, and therefore will not pass by the Word *Altarage*, strictly taken, because 'tis only what is offer'd at the *Altar*; but when by Custom or Usage, Tythe-Wood hath been paid to the Vicar, it shall be construed to pass by that Word *Altaragium*.

So likewise by Custom and Usage (n) it will pass Tythe-Wood to the Vicar.

Sir *Simon Degg* tells us, that in some old Endowments we may find the Word *Altare omnia*, and cites the Case beforemention'd in *Cro. Eliz.* and *Spel. Glossary in verbo*, in the Margent there; what he means by it I cannot tell, for there is no such Word to be found there, and I believe no where else.

These Oblations at the *Altar* were uncertain, both in respect to the Quality and Quantity of the Things offer'd, which was sometimes in Bread and Wine, and sometimes in Money; but how much of each I cannot discover, tho' it seems there was an accusom'd *Altarage*:

But be it how it will, the Vicars were not contented with it, for they would not suffer the People to come to Confession, before they had deposited some Money beyond the usual Offering; and when a Canon was made to prohibit them from extorting Money upon this Occasion, they found out a Way to make Leases of their Ecclesiastical Profits, which was likewise prohibited by another Canon in Cardinal *Osbo's* Time.

(1) *Cro. Eliz.* 578. † *Spelm. Gloss.* 28. (m) *Litt. Rep.* 244. *Hetley* 135. (n) *Brett. vers. Ward Winch.* *Annals.*

Annats.

These are the Profits of one Year of every vacant *Bishoprick* in *England*, claimed at first by the *Pope*, upon a pretence of defending the Christians from the Infidels; and it was paid by the succeeding *Bishop*, before he could receive his Investiture from *Rome*.

Afterwards the *Pope* prevail'd on all those who were Spiritual Patrons to oblige their Clerks to pay these *Annats*; and so by Degrees they became payable by the Clergy in general.

Some of our Historians tell us, that *Pope Clement* was the first who claim'd *Annats* in *England* in the Reign of *Ed. I.* but (o) *Mr. Selden*, in a short Account which he has given us of the Reign of *William Rufus*, affirms, that they were Antiently claim'd by the *Pope* before that Reign, but our Chronologers differ about the time when they became a settled Duty, and payable to him.

Platina tells us, that *Boniface IX.* who was *Pope* in the first Year of *H 4.* *Annatarum usum Beneficii Ecclesiastici primum imposuit, (viz.) dimidium Annui proventus fisco Apostolico persolvere.*

Walsingham affirms it to be above 80 Years before that time, (viz.) in the time of *Pope John the 22.* who was *Pope* about the middle of the Reign of our *Ed. 2.* and that he *Reservavit Camerae suae primos fructus beneficiorum*: But the learned † *Bishop of Worcester* hath made this Matter more clear:

He tells us that the old and accusom'd Fees paid here to the feudal Lords were call'd *Beneficia*, and that the Popes being Lords or spiritual Heads of the Church, they were not contented with an empty, tho' very great Title, without some temporal Advantage, and therefore *Boniface VIII.* about the latter end of the Reign of our *Ed. 1.* having assumed an absolute Dominion in Beneficiary Matters made himself a kind of feudal Lord over the Benefices of the Church, and as a Consequence thereof claim'd a Years Profits of the Church, as a beneficiary Fee due to himself, the chief Lord:

But tho' the Power of the *Pope* was then very great here, yet the King and the People did not comply with this Demand, insomuch that by the Statute of *Carlisle*, which was made in the last Year of his Reign, and about the beginning of the Pope-dome of *Clement V.* this was call'd a new *Imposition*, that it was *Gravis & intolerabilis, & contra leges & consuetudines regni*, and by reason of so powerful an Opposition the Matter rested for some time.

But that *Pope* having translated his Court from *Rome* to *Avignon*, his Successors by that Means found more favourable Opportunities to insist on this Demand, which was a Years Profits

of the vacant Bishoprick at a reasonable Valuation, and that was about a Moiety of the full Value; and having obtain'd what they demanded, they afterwards endeavour'd to raise the Value, but were oppos'd in that likewise by the Parliament, Anno 6 H. 4. and a Penalty was inflicted on those Bishops, who paid more for their First-Fruits than was accustom'd.

Now certainly our own Countrymen are rather to be believ'd in this Matter than *Platina*, because we find that *Ed. 3. (b)* forbid the *Pope's* Collector to gather, and the People to pay First-Fruits, for that it was a *meer Novelty*; and if so, they could not be first appropriated *Fisco Apostolico in the time of H. 4.* for it was then grown into a Custom to pay them to the *Pope*, and therefore in the 4th and 6th Years of R. 2. upon the Petition of the Commons of *England*, Provisions were made against collecting these *Annats*, and *Annis 6 & 9 H. 4. (c)* this was call'd a horrible Mischief, and damnable Custom; and it was then enacted, that the *Pope's* Collectors should no longer levy First-Fruits in this Kingdom.

But notwithstanding these Statutes against Provisions, such was the Plenitude of the *Pope's* Power, and so great was the Profit which accrued to him by this Invention, that in a little more than half a Century there was 160000 *l.* paid to him under the Name of *(d) Annats* for expediting *Bulls of Bishopricks only*.

The Payment of these was continu'd till about the 25th Year of H. 8. *cap. 20.* and then an Act was made, reciting, that since the beginning of that Parliament another Statute was made for the suppressing the Exaction of *Annats* of Archbishops and Bishops, wrongfully taken by the *Pope*; and that no Bishop hereafter shall pay the same, under the Penalty of forfeiture of his Goods and Chattels to the King, and all his Temporal Possessions belonging to his Bishoprick, during the time he should have any Title to the same; which Act is not printed.

But the Parliament being unwilling to go into Extremities, remitted the putting that Act in Execution to the King himself, that if the *Pope* would either put down *Annats*, or to moderate the Payment by a certain time, that they might no longer be a Burthen to the People, then the King by Letters Patents might declare the Act should be of no force.

The *Pope* having Notice of all this Matter, and taking no Care to reform those Exactions, therefore that Statute was confirm'd; and because it only extended to *Annats paid for Archbishopsricks and Bishopricks*, therefore in the very next Year another Statute was made 26 H. 8. *cap. 3.* that not only those First-Fruits formerly paid by *Bishops*, but those of every other *Spiritual Living* should be paid to the King; and in this Act

(b) 4 Inst. 120. (c) 4 Inst. 120. (d) Bur. Hist. Ref. 1 Vol. Coll. Rec. 103.

there is a Clause, that if any Person should be convicted by Presentment, Confession, or Witnesses before the Lord Chancellor or Commissioners, &c. to have entred on a Spiritual Living before Payment or Composition made for the same, he should forfeit double the Value of such First-Fruits: And because in that Statute it was not declar'd when the Year should commence for the Payment of the First-Fruits, that is to say, whether from the Death, Resignation, or Deprivation of the Incumbent, or from the time of his Successor's being admitted to the Benefice; therefore about two Years afterwards another * Act was made, by which it was enacted that the Year shall commence immediately after the Avoidance. Notwithstanding these Laws, there were still some Apprehensions, that upon the Death of several Prelates who were then very old, great Sums of Money would be convey'd to Rome by their Successors, therefore Anno 33. H. 8. it was enacted, That all Contributions of Annats for Bishopricks, or for any Bulls to be obtain'd from the See of Rome should cease, and not be paid, under the Penalty of forfeiting all his Goods, and his Temporalties during the time he should possess the same; and if the Pope should deny any Bulls of Consecration by reason of this Prohibition, then the Bishop presented should be Consecrated in England by the Archbishop of the Province; and if it was in the Case of an Archbishop, then he should be Consecrated by any two Bishops to be appointed by the King; and that instead of Annats, a Bishop should pay to the Pope 5 l. per Cent. of the clear yearly Value of his Bishoprick.

But before this time, viz. 32 H. 8. cap. 42. there was a Court erected by the Parliament, for the Levying and Government of these First-Fruits, which Court was dissolv'd by Queen Mary; † and in the next Year the Payment was order'd to cease as to her.

But Anno 1 Eliz. they were again restor'd to the Crown, and the Statute 32 H. 8. which directed the Grant and Order of them was re-continu'd; and that they should be from thenceforth within the Government of the Exchequer.

But Vicaridges not exceeding 10 l. per Annum, and Parsonages not exceeding 10 Marks, according to the Valuation, in the First-Fruits-Office, were exempted from Payment of First-Fruits; and the Reason is, because Vicaridges, in time of Popery, (when this Valuation was made) had a large Revenue, by voluntary Oblations, which ceased upon the Dissolution, &c. and therefore they had this Favour of Exemption allow'd to them afterwards.

By the before-mention'd Statute, a new Officer was created, call'd a Remembrancer of the First Fruits, whose Business was

* 28 H. 8. cap. 11. † 1 Mar. cap. 10. 2 & 3 Ph. & Mar. cap. 4.

to take Compositions for the same; and to send Proceſs to the Sheriff, againſt thoſe who did not pay it; and by the Act 26 H. 8. he who entered into a Living, without compounding, or paying the Firſt Fruits, was to forfeit double the Value.

To prevent which Forfeiture, it was uſual for the Clerk newly preſented, to give four Bonds to pay the ſame, within Two Years next after Induction, by four equal Payments.

But tho' theſe Bonds were executed, yet if the Clergyman dy'd, or was legally depriv'd before the Payments became due, it was a good Diſcharge by Virtue of the Act 1 Eliz. before-mention'd.

And thus it ſtood, till Queen *Anne*, taking into Conſideration the inſufficient Maintenance of the poor Clergy, ſent a Meſſage to the Houſe of Commons by one of Her principal Secretaries, ſignifying Her Intention to grant the Firſt Fruits for the better Support of the Clergy; and that they would find out ſome Means to make her Intentions more effectual.

Thereupon an Act was paſſed, by which the Queen was to incorporate Perſons, and to ſettle upon them and their Succeſſors the Revenue of the Firſt Fruits; but that the Statutes before-mention'd ſhould continue in Force, for ſuch Intents and Purpoſes as ſhould be directed in Her Grant: And that this new Act ſhould not extend to impeach, or make void any former Grant made of this Revenue.

And likewise any Perſon, except Infants and Feme-Coverts, without their Huſband, might, by Bargain and Sale enrolled, diſpoſe Lands or Goods to ſuch Corporation, for the Maintenance of the Clergy, officiating in the eſtabliſh'd Church, without any ſettled competent Proviſion belonging to the ſame; and the Corporation might alſo purchaſe Lands for that Purpoſe, notwithstanding the Statute of *Mortmain*.

Purſuant to this Law, the Queen, Anno 3. of Her Reign, incorporated ſeveral of the Nobility, Biſhops, Judges and Gentry, &c. by the Name of the Governors of the Bounty of Queen *Anne*, for the Augmentation of the Maintenance of the poor Clergy, to whom She gave the Firſt Fruits, &c. and appointed the Governors to meet at the Prince's Chamber in *Westmiſter*; or in any other Place in *London* or *Westmiſter*, to be appointed by any Seven of them; whereof a privy Councellor, a Biſhop, a Judge, or Councellor at Law, to be of the *Quorum*; there to conſult about the Diſtribution of this Bounty.

That Four Courts ſhall be held by theſe Governors in every Year, viz. in the Months of *December*, *March*, *June* and *September*; and that Seven of the ſaid Governors, whereof ſuch Three, as aforeſaid, to be of the *Quorum*, ſhall be a Court; and that the Buſineſs ſhall be diſpatch'd by Majority of Votes; that ſuch Courts may appoint Committees out of the Number of the Governors, for the better managing their Buſineſs; and at their firſt, or any other Meeting, propoſe in Writing, and deliver to the Queen what Methods they ſhall think fit for the Govern-

ment of the Corporation ; which, being approv'd under the Great Seal, shall be the Rules of the Government thereof.

That the Lord Keeper shall issue out, at Writs of Enquiry, at the Request of Seven of the Governors, *Quorum tres, &c.* directed to three or more Persons, to inquire, upon Oath, into the Value of the Maintenance of poor Parsons who have not *80 l. per Annum*, and the Distance of their Churches from *London* ; and which of them are in Market, or Corporate Towns, or not ; and how the Churches are supplied ; and if the Incumbents have more than one living ; that Care may be taken to encrease their Maintenance.

That Seven of the Governors, (*Quorum tres, &c.*) after such Enquiry made, do prepare and exhibit to the Queen, &c. a true State of the yearly Value of the Maintenance of all such Ministers, and of the present yearly Value of the First-Fruits and Arrears thereof, and of such *Pensions as are now payable out of the same*, by Virtue of any former Grants.

That there shall be a Secretary, and a Treasurer, who shall continue in their Office, during the Pleasure of the Corporation : That they shall take an Oath before Seven of the Governors in Court, *Quorum tres, &c.* which Oath the said Court shall have Power to administer, for the faithful Execution of their Office ; and that upon Death, or Removal, another shall be chosen, or any other Officer, by Majority of *Votes*.

That the Treasurer must give Security to Account for the Money which he receiv'd ; and that his Receipt shall be a Discharge for what he receives ; and that he shall be subject to the Examination of Four or more of the Governors, *Quorum tres, &c.*

That the Governors shall collect and receive the Bounties of other Persons ; and shall admit into their Corporation any Contributors (whom they think fit) to so pious a Work ; and that Seven of them, *Quorum tres, &c.* may substitute Persons, under their Common Seal, to take Subscriptions, and collect the Money contributed ; and that the Names of the Benefactors shall be registred in a Book to be kept for that Purpose.

This is a short History of *Annats*, or First-Fruits : By which the Reader may see, that at first this was a *Payment* claim'd only from Bishops, upon a plausible, but false, Pretence, to be employ'd by the *Pope* in Defence of the Christian Religion against *Pagans*.

I admit there was a Necessity in those Days for the Bishops to comply with this Exaction, because otherwise they might be in Danger of losing their Bulls of Consecration from *Rome*, and they could have them no where else.

But the undignified Clergy had not such an immediate Dependence upon the *Pope* ; and therefore it was a mean and ungenerous Act for the Bishops of those Times, and other Spiritual Patrons, to draw in their Clergy to submit to this *Payment* because

because it made them poor for no other purpose, than to heap Riches upon a foreign *Prelate*.

When the Quarrel happened between him and *H. 8.* as these *Annats* were gradually claimed, so they were by Degrees taken from him; for the King at first prohibited only the Bishops to pay them, that he might see how it would be resented by the *Pope*.

But he regarded it as little as his Predecessors did all the Statutes made against Provisions, &c. and probably had any other Prince been upon the Throne, it would have met with the like Effect.

But that King was of a Temper, both to be feared and obeyed: and tho' the *Pope* was his Spiritual Father, yet he did not like he should have so large a *Patrimony* here, and therefore he took a little of it himself, and particularly these *Annats*, which, excepting only a little Intermission, have remained in the Crown ever since, till the Queen, commiserating the Condition of the poorer Clergy, hath voluntary given it for the Encrease of their Maintenance, that they may spend less of their time in acquiring the Necessaries of this Life, and more in the Service of their God; that by their earnest Application to him in Prayer, their charitable Benefactress may be crowned with Success in all Her Endeavours to promote *Piety* and *Peace* here upon Earth; and that She may enjoy a Crown of Glory hereafter.

Apparator.

THIS is a Messenger who cites Persons into the Spiritual Court, and serves the Process thereof; the *Civilians* call him *Animal tantum rationale*, by which it may be inferred, that he is of a meaner Capacity than a Sheriff's Officer.

But because he is such an inconsiderable Animal, 'tis fit the Court should not be troubled with many of them, which they usually employed, till the Number was restrained by a Canon (*a*) (*viz.*) that a Bishop, or Archdeacon, or Official, should have no more than their Predecessors, for Thirty Years before the making of that Canon; that such an *Apparator* should faithfully execute the Mandates of the Court, and make no Deputation, unless known and approved by the Ordinary; that he should not be an Informer, nor take more Fees than prescribed in the 135th Canon.

Bishops deputing more *Apparators*, or they offending in the Premises, shall be admonished by their Superior, and discharged; and if deputed by others, they shall be suspended from their Office, till they dismiss them; and the Person thus deputed, shall never execute the Office of an *Apparator*; but if he doth (being once removed) he shall be punished by Ecclesiastical Censures for Contumacy.

By a * provincial Constitution, it was ordered that a Bishop shall have one *Apparator*, *Equitatem duntaxat*; and the Gloss observes, that he may have as many of these Foot-Officers as he will; but an Archdeacon is to have but one; but not a Horseman in every Deanary.

I thought it proper to mention these things, tho' neither the Number, nor the Manner of riding or walking, is now much regarded, but as the Conveniency of serving the Process requires.

However, tho' our *Apparator* is an Ecclesiastical Officer, yet the Temporal Courts may punish him for any Falshood in the Execution of his Office, of which I shall give some Instances; but first, I shall mention a Case, which might have been proper, under the precedent Title, but is not foreign to this, because it shews the Nature of his Office, and 'tis thus:

An *Apparator* came to the Church, and told the Parson † he must pay the Tenths to such a Man, and at such a Place, which was four Miles distant from his Church; and the Bishop certified the Ecclesiastical Court, under his Seal, that he refused to pay it; and thereupon another Parson was admitted and instituted; because by the Statute, 26 H. 8. cap. 3. where the Tenth is due, and demanded by the Bishop, or such who shall be charged to collect it; or by his Ministers, Servants or Officer; and 'tis not paid then, upon such Certificate, the Incumbent is *ipso facto* deprived: Now all this Matter was found, specially upon a Verdict in Ejectment, brought by the last Incumbent; but it was adjudged that this was no positive, or express Demand to pay this Duty; besides, it should be made by one who had Authority to receive it, which an *Apparator* hath not.

In the next Place, as to punishing him for any Falshood in his Office, (a) if a Monition is awarded to him, to summon a Man to pay Costs assessed by the Court; and he returns that he had summoned him, when, in Truth, he had not; and thereupon the Defendant is excommunicated, an Action on the Case lies against him.

So if he falshly and maliciously, *Colore Officii*, (b) cites a Man into the Consistory Court, upon a Fame of Incontinency, and the Party is discharged upon his Answer, he shall have the like Action; because it shall be intended, that he did it without Process.

And this Punishment by Action seems more proper than what was inflicted on the Arch-bishop's *Apparator*, by *Bogo de Clare*, Anno 18 Ed. 1. (c) who having served a Citation upon him, in Parliament Time, some of his Family made the poor *Apparator* eat both the Citation and the Wax.

And as the Temporal Courts may punish an *Apparator*, so

* Lyndw. cap. de censib. † Moor 541. (a) Rol. Abr. 92. 2 Cro. 351. Moor 833. 2 Bulst. 263. (b) Cro. Car. 291. 1 Rol. Abr. 93. (c) Pryn. 4 ple. Pail. Writ. 825.

they may likewise take Notice of his Fees; for if he should Libel in the Spiritual Court for his usual Fees, a Prohibition will lie upon a Suggestion, that the Fees, which he claims, are not due by Custom or Prescription. 1 Vent. 165.

And lastly, Because many Abuses were occasioned by these Officers, therefore Bishops, Archdeacons, and their Vicars and Officials, are prohibited by the Canon (f) to have more *Apparators* than their Predecessors had for thirty Years next, before the publishing the said Canon; and that such *Apparators* shall execute their Mandates themselves, and make no Substitute without Leave of the Ordinary; that they shall not be Informers, nor take more Fees than allowed by Law, &c,

Appeal.

THIS is the Removal of a Cause from an Inferior to a Superior Court, which hath Power to reverse or affirm any former Judgment made or given in that Cause; and this seems to be a natural and fundamental Part of Justice: For since Men are subject to Mistakes in subordinate Judicatures, there ought to be Superior Courts to rectifie those Errors, and to preserve Justice.

In the antient Catholick Church in this Kingdom, all Ecclesiastical Matters were determined by a Bishop with his Presbyters, from whose Sentence there was an Appeal to the Metropolitan in a provincial Synod, from whence there was no farther Appeal, even to a general Council; 'tis true, the supream Magistrat might order the Matter to be re-heard in such Council, but this was by his Authority when he had a mind to interpose, but not by Way of Appeal.

But afterwards, when the Papal Power was exalted, Appeals were made to *Rome*; tho' this was prohibited by the Council of *Milan*, in which St. *Augustine* was Secretary; and *Episcopus* relates the very Words of the Canon.

It was also directly against a Decree of a whole *African* Council, in which St. *Austin* presided: And therefore I shall give a short Account of the Rise and Progress, and at last of the Statutes, prohibiting Appeals to *Rome*.

Athanasius (g) being deposed from his Bishoprick of *Alexandria*, by two Synods of *Eastern* Bishops, upon Pretence of some Misdemeanours, and finding no Redress among them, because the Heresie of *Arim* was very powerful there, he applied himself to *Julius* then Bishop of *Rome*, that his Cause might be re-heard,

Julius being the Chief of the *Western* Bishops, communicated this Matter to the Rest; and he, in their Names, sends to the Bishops of the *East*, that they would assist, and be present at this re-hearing, which they either refused, or neglected to do.

(f) Car. 138, (g) Still. Orig. Brit. 136,

Thereupon the Bishops of the *West* re-examined the Cause, and received *Athanasius* into their Communion.

But the *Eastern* Bishops being offended at these proceedings; to reconcile the Difference, the Emperors *Constantius* and *Chlorus* appointed a general Council to be held at *Sardica*, where the Bishops, both of the *East* and *West* met; and among the rest some of our *British* (b) Bishops were there; tho some learned Men question whether it was so or not; this happened about the middle of the 3d. Century.

This Council did not sit long, for the Bishops of the *West* would have *Athanasius* admitted amongst them, because they had restored him; but the other refused, and so withdrew, and protested against their Proceedings; yet the *Western* Bishops continued sitting, and made Canons concerning the re-hearing the Causes of Bishops, (*viz.*) if the Party was grieved at the Sentence, that then a re-hearing should be granted.

But this gave no peculiar Authority to the Bishop of *Rome* to receive Appeals, he had no such Power before; and that which was given to him, by a particular Council, and upon present and emergent Occasions, could not be binding to Posterity; especially since that Power which was originally limited, was afterwards claimed by him, as an absolute and supreme Right, and that as the Head of the Church, and not by the Act of that Council.

Now 'tis plain, that the Canons, made in that Council, gave him no Right to draw Causes to *Rome*, by way of Appeal, because it was then decreed, that the Causes of Bishops, in the very first Instance, should be heard by the Bishops of the Province.

Besides, that Council it self took upon them to judge *Athanasius* his Cause, which had been judged before by the Bishop of *Rome*, to whom it was remitted by the aforesaid Emperors, who might have decided the Matter themselves; for they had a Power over all Ecclesiastical Causes in the *Empire*; But about the Beginning of the next Century in the 6th Council of *Carthage*, where the *African* Bishops were assembled, and continued sitting six Years, Appeals to *Rome* were expressly prohibited; and it was then decreed, that all Ecclesiastical Causes should be decided by the Bishop and Metropolitan, from whom an Appeal should lye to a provincial Council, and from them to a general Council, and no farther: *Ne ullum jus deinceps Romano Pape super Africanum Ecclesiam concernatur.*

In *France* these Appeals were prohibited by the Law, called the *Pragmatick Sanction*, which was made *Anno* 1268. and our History called *Quadriologus*, above one Hundred Years before that time, gives us an account of the Constitutions of *Clarendon*, made *Anno* 10. H. 2. by which the Bishops did recognize the

(b) Bp. of St. Asaph's Church Government, 76.

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But still the Power of drawing Causes to *Rome* by way of Appeal was usurped, and as frequently opposed by our Kings, that it was inconsistent with the Supremacy of the *Pope*.

The Cause of his Appeal was thus: (*viz.*) *Clement* and *Urban* were Competitors for the *Popedom*; the King inclined to the Title of the one, and the Archbishop owned the other, which the King told him was a thing never done by any of his Predecessors, without the Royal License; and that he would not be deprived of his Prerogative, and therefore commanded him not to own *Urban*.

The Archbishop refused to comply, but insisted to go to *Rome*: for his Pall; thereupon the King told him, that if he went thither, he would seize on the Revenue of his Archbishoprick, but that did not prevail with him.

The King, seeing him resolved to go without his Leave, required him to take an Oath; not to appeal to the *Pope*, upon any Occasion whatsoever; which if he refused, then he ordered him to depart immediately, and accordingly he departed, and the King seized all his Goods.

The Archbishop appealed to the *Pope*, that the King had subverted the Laws of God, and all Canonical Constitutions, and would not give him leave to come to his Holiness for Redress.

The *Pope*, having heard this Complaint, promised Relief, and wrote to the King to restore him under Pain of Excommunication; but the King having sent an Envoy to *Rome*, he so far prevailed at that Court, that tho' the Archbishop's Cause was propounded in a Council held there, yet nothing was done to his Advantage; the *Pope* himself putting a Stop to all farther Proceedings against the King.

Mr. *Pryn* (*i*) in his Animadversions on my Lord *Coke*, denies this to be the first Appeal from hence to *Rome*; for he tells us that *Wilfrid*, Archbishop of *Tork*, being deposed in the Reign of *Egfrid*, King of *Northumberland*, appealed to *Rome*, where the *Pope*, in a full Council, decreed him to be restored:

But that Decree was never received here; so that (*k*) *Wilfrid* returning, went as far from the *North* as he could, and came into *Sussex*, where the King, who ruled in those Parts, gave him *Selfey*, and there he founded a Monastery, which his Successors held for many Years; and it was afterwards made the Seat of the Bishop of that Diocese, and so it continued till removed to *Chichester*.

But in the Reigns of succeeding Kings, as the *Pope's* Su-

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premacý came to be exalted, Appeals to him were a necessary Consequence thereof; and for a long time the Papal Authority prevailed over the Regal; but at last the *Pope's* living at *Avignon*, and being followed with Schisms, when they returned to *Rome*, their Power began to sink; and then Councils asserted the Freedom of the Church from Papal Encroachments, till at last Princes and Popes divided all the Rights which were claimed by the Church; and Kings re-assumed the Power of determining Causes by Appeals, in their Secular Courts; but still with so tender a Regard to that Spiritual Jurisdiction, which had been practised in such Cases, that a Distinction was found out to palliate their Authority; for the Cause of Appeal was supposed to be upon some Irregularity committed by the Ecclesiastical Judge in his Proceeding, so that the Appeal was from the Abuse, not from the Power.

Besides, the Secular Courts were to re-hear the Cause according to the Canon, so by this means they possessed themselves of it, but gave Judgment according to the Common Law.

These Appeals to *Rome* were very frequent, which at first were rarely brought, but upon great and extraordinary Occasions, which seldom happened; and it was an unusual thing in the Reign of King *Stephen*: For when a Difference happened between *Henry* Bishop of *Winton*, that King's Brother, and the Archbishop of *Canterbury*, because *Winton* was made the *Pope's* Legate, which the other thought to be an Encroachment on his Right as *Legatus natus*: The Legate appealed to *Rome*, which the Writers of that Age affirm to be the first Appeal thither; but that may be a Mistake; however *Gerard* and *Huntington* tells us, that *In Anglia appellationes non erant in usu*; and they that were *inaudita* here donec *Henricus*, dum *legatus* *set*, *Malo suo crudeliter intrusit*.

But the time was now come, when the *Pope's* Authority was to be suppressed here; and the Bishop of *(1) Sarum* tells us by what Degrees; as first it was disputed, what Power he had to dispence with the Laws of God; from that they inquired what Jurisdiction he had in the Causes of Men; upon which followed the Conviction of the Clergy in a Premunire; for this led the Parliament to controvert his Right to *Annats*, which they condemned, and then naturally followed the Condemning all Appeals to *Rome*.

And now I shall give a short Account of that Statute of 24 *H. 8. cap. 12.* by which all Appeals to *Rome* were prohibited; a Statute which is founded upon the natural and independent Right of our Kings, to do Justice to all their People; a Statute by which the Antient Right of the Crown was re-assumed; for tho' that Right was given up by King *John*, yet it always claimed by his Successors; and sometimes with that Courage, as to commit the Appellants.

The Preamble of the Statute takes Notice, that the Crown of England is Imperial, and that the Nation is a compleat Body within it self, with full Power to administer Justice in all Cases whatsoever; and that this was a Truth which appear'd by many ancient Histories and Chronicles.

That former Kings of England and their Parliaments had made Laws, by which they preserv'd the Prerogatives of the Crown, and the Liberties of the People, from any Violation by foreign Princes or Powers; that notwithstanding such Laws, many Inconveniencies had happen'd by reason of Appeals to Rome, both in Expences and Delays of Suits; therefore it was enacted,

That all Causes Testamentary, and Matrimonial Divorces, Rights of Tythes, Oblations and Obventions, shall be adjudg'd within the King's Authority, and not elsewhere; notwithstanding Appeals to Rome, or any Inhibitions or Bulls from thence; that if any Spiritual Persons refus'd to execute Sentences given in their Courts, for fear of any Censures from Rome, they should be committed for a Year, and fined at the King's Pleasure; and if any Person procur'd or executed any Process from Rome, he should be guilty of a Premunire.

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| But by this Statute Appeals are allowed in these Cases: | } | (1.) | { | From the Archdeacon or his Official to the Bishop of the Diocess, or his Commissary. |
| | | | | |
| | } | (2.) | { | From the Commissary to the Dean of the Arches, and from him to the Archbishop of the Province, whose Determination shall be final; the Appeal must be within Fifteen Days after Sentence. |
| | | | | |

But some Alteration was made in this last Matter, in the very next Year, (*viz.*) that Appeals from the Archbishop's Court shall be made to the King in Chancery, where the Lord Keeper is to issue out a Commission under the Great Seal, to certain Persons nam'd by the King, from whom there shall be no farther Appeal; and this is call'd the Court of Delegates.

One would think by these restrictive Words, that a Sentence given in that Court should be definitive, but yet 'tis otherwise: For the Queen (*m*) even after such Sentence, may grant a Commission of Review; because the Pope could do it by Virtue of the Canon Law; and what he could do by Virtue of an usurp'd Supremacy the Queen may do, because 'tis a legal Right vested in the Crown; this is the Reason given by my Lord Coke, who tells us he was Attorney-General, and did maintain this Prerogative.

'Tis certain this is a Prerogative vested in the Crown; but my Lord Coke's Reason is not conclusive, that because the Pope exercis'd a Power by Usurpation, therefore the Queen may lawfully use the like Power.

I know *Commissions of Review* are frequently granted, notwithstanding the Statute enacts, That from a Sentence of Commissioners Delegate, there shall be no Appeal : and that the Practice hath obtain'd against an expresse and positive Law ; but it was not very clear at first, for it was debated in *Holliswell's Case*, where Justice *Fenner* denied my Lord *Coke's* Reason ; because the Authority of the Pope was abrogated, and Appeals were restrain'd by these Statutes ; 'tis true, he cited one *Goodman's Case*, where it was so adjudg'd, which I find reported by another Name in my Lord *Dyer* ; and because 'tis probable my Lord *Coke* grounded his Opinion upon it, I shall only State it.

The Deanry of *Wells* (n) was dissolv'd by Act of Parliament, and a new one erected ; and the King appointed *Goodman* to be the first Dean, who was afterwards made a Prebendary of *Vivelscomb*, being a Prebend of the same Church, for which he was depriv'd by the Commissary of the Bishop of *Bath and Wells* ; because by the Canon Law he could not hold two such Dignities *simul & semel* in the same Church.

He appeal'd to the Archbishop, who confirm'd the Sentence ; then he appeal'd to the King in *Chancery* ; and pending this Appeal, the King granted the Deanry to *Turner* ; and upon the Death of *Ed. 6.* *Goodman* obtain'd a Commission from Queen *Mary* to the *Delegates* who restor'd him.

Now, tho' the Statute saith, that a Sentence given by the *Delegates*, shall be definitive ; yet *Turner* obtain'd a Commission of Review from Queen *Elizabeth*, and the Commissioners restor'd him, notwithstanding *Goodman* objected against it as invalid, for the Reason abovemention'd ; but the Objection was over-rul'd, because the Queen hath all that Authority which the Pope (o) had formerly as Head of the Church ; and he did grant *Commissions of Review*, therefore She may do it :

Not because he had done it by Usurpation, but because this Power was originally in the Crown, to which it reverted as soon as that usurped Power of the Pope was abrogated.

But to proceed ; all Appeals to a Court of Delegates, (q) and grounded on the Statutes beforemention'd, must be upon Suits begun and determin'd in the Spiritual Court, or in some Court exempted from the Jurisdiction of the Ordinary ; for if the Suit is before any Spiritual Commissioners ; as that of *Stephen Gardner* (q) was, who was depriv'd of his Bishoprick of *Winton*, by Ten Commissioners appointed by King *Ed. 6.* in such Case the Appeal will not lie to the King in *Chancery*, so as for the Lord Keeper of Course to grant a Commission of Delegates ; but it must be to the King generally, as he is the Supreme Head of all Ecclesiastical Jurisdiction ; and there must be a

+ Moor 463. (n) *Dyer* 273. (o) 26 H. 8, cap. 1. 1 Eliz. 1
(p) 2 Rol. Abr. 232. (q) 4 Inst. 340.

Warrant under the Sign Manual, before he can grant a Commission in such Case.

The said Statutes allow an Appeal from the *Dean of the Arches* to the Archbishop of the Province, but do not mention in what Court; therefore it hath been a Question, whether an Appeal to him in *Curia Prærogativa sua de arcubus* (r) is good or not; and it was held, the Appeal being to the Archbishop those Words in *Curia Prærogativa* are Surplusage.

(3.) There is another Case in which Appeals are allow'd by that Statute; and that is, if it concerns the King himself, then the Party may appeal from any of the Courts before-mention'd, as from the Arches or Delegates to the Upper-House of Convocation.

These are the three Causes for which Appeals are allow'd by that Statute, which provides that, if an Appeal is purchas'd contrary to that Act, the Party so prosecuting it shall be guilty of a Premunire.

The next Year after the making that Law, (f) all Appeals to Rome were expressly forbidden, under the like Penalty; but by 13 *Eli.* cap. 2. 'tis made High-Treason,

These Laws were but a Recognition of the Ancient Rights of the Kings of England; for by the Constitutions of *Clarendon*, Anno 10. H. 2. (t) 'tis acknowledg'd so to be, where the same Method of Appeals from one Court to another was appointed, and no farther without the King's express Leave.

'Tis likewise to be observ'd, That by the first Statute, viz. 24 H. 8. appeals in the three Cases before-mention'd, viz. *Testamentary*, *Matrimonial*, and for *Tythes*, shall be from the Archdeacon to the Bishop, &c. But by the next Act in the Year following 'tis provided, That all manner of Appeals, of what Nature soever, shall proceed *gradatim* in the like Method.

Appropriations.

WHEN *Benedict*, who was the Father of those who profess'd a regular Life in the *Western Church*, retir'd into a solitary Place in *Italy*, from those Tumults which happen'd under the Reign of *Justinian*, and gave himself wholly to the Service of God, he soon acquir'd a great Reputation for his Holy Life; and several Persons came and submitted themselves to those Rules, which he impos'd on them for the Government of their Lives, so that they grew into a † Fraternity; and the Princes of those Times, admiring their Holy Lives and Conversation, built Houses for them, which were call'd Monasteries; and were so liberal to them, that they appropriated presentative Benefices to those Religious Houses.

(r) Dyer 240. (f) 25 H. 8. cap. 19. (t) Preface to 6 Rep. † Anno 524.

This was frequently done here after the *Norman Invasion*; the Secular Clergy being then *Saxons* or *Englishmen*, but most of the Nobility, Bishops and Abbots, being *Normans* they had no manner of Regard to the Secular, but reduc'd them as low as they could to enrich their Monasteries; and this was the reason of so many Appropriations- But some are of Opinion, that 'tis a Question undecided, Whether Princes or Popes first made Appropriations; tho' the oldest of which we have any Account was made by Princes. As for Instance; By the *Saxon Kings*, to the *Abby of Crowland*; by *William* call'd the *Conqueror*, to *Battle-Abby*; and by *H. 1.* to the Church of *Salisbury*.

'Tis true, the *Popes*, who were always jealous of their usurp'd Supremacy in Ecclesiastical Affairs, did in their Decretals assume this Power to themselves, and granted Privileges to several Religious Orders, to take Appropriations from Lay-men; but in the same Grant they were usually requir'd to be answerable to the Bishop in *Spiritualibus*, and to the Abbot or Prior in *Temporalibus*, which was the common Form of Appropriations till the latter End of the Reign of *H. 2.* for at first, and not till then, those Grants were not *Ad proprios usus*, for they were always oblig'd to present a Clerk to the Bishop upon the Avoidance of a Benefice, who upon his Institution became their Vicar, and for that Reason an Appropriation and a Rectory were then inconsistent;

But because the making an Appropriation was a thing meerly Spiritual, the Patron usually petition'd the Bishop to appropriate the Church; but the King was first to give License to the Monks that *Quantum in nobis est*, the Bishop might do it; and then he made the Charter of Appropriation in these Words, (u) *Auctoritate nostra ordinaria Ecclesiam parochialem de H. priori & conventui L. annuimus appropriamus & unimus per presentes, salvis nobis & Successoribus nostris jure & auctoritate pontificali.*

But the King being supreme Ordinary, (x) might of his own Authority make an Appropriation without the Consent of the Bishop, tho' this was seldom done.

Appropriations at first were made only to Spiritual Persons, such as were qualified to perform Divine Service; then by degrees they were extended to Spiritual Corporations, as Deans and Chapters, and lastly to Prioressees, upon a Pretence to support Hospitality; and least Preaching should by this Means be neglected, an Invention was found out to supply that Defect by a Vicar, as aforesaid, and it was left to the Bishop to be a Moderator between the Monks and the Vicar, for this Maintenance out of the appropriated Tythes; for the Bishop could compel the Monastery to which the Church was appropriated to set out a convenient Portion of Tythes, and such as he should approve for the Maintenance of the Vicar, before he confirm'd the Appropriation.

'Tis true the Bishops in those Days favour'd the *Monks* too much, and therefore they conniv'd at their setting out a Portion of small Tythes for the *Vicar*, and permitted them to reserve the great Tythes to themselves.

This was a Fault intended to be remedied by the Statute 15 R. 2. cap. 6. by which it was enacted; that in every License made of an Appropriation this Clause should be contain'd, (*viz.*) that the Diocesan shall ordain, that the *Vicar* shall be well and sufficiently endow'd.

But this Statute was eluded; for the Abbots appointed one of their own *Monks* to officiate, and therefore the Parliament, Anno 4. H. 4. cap. 12. provided that the *Vicar* should be a Secular Man canonically instituted and inducted into the Church, and sufficiently endow'd; and that no Regular should be made *Vicar* of a Church appropriate.

But long before the making these Statutes, I find the Kings of England (*y*) made Appropriations of the Churches of *Feverham* and *Middleton* in *Kent*, and other Churches, to the *Abby* of *St. Austin* in *Canterbury*, by these Words: *Concessimus, &c. pro nobis, &c. Abbati & conventui, &c. quod ipsi ecclesias predictas appropriare ac eas sic appropriatas in proprios usus, tenere possunt sibi & Successoribus in perpetuum*:

The like was done by several of the *Norman Nobility*, who came over with the King; and upon whom he bestow'd large Mannors and Lands; and out of which they found Tythes were then paid, and so had continu'd to be paid even from the time they were possess'd by the *Saxons*; but they did not regard their Law of Tything, and therefore they held it reasonable to appropriate all, or at least some Part of those Tythes, to those Monasteries which they had founded, or to others as they thought fit; and in such Cases they reserv'd a Power to provide for him, who serv'd the Cure; and this was usually paid to Stipendiary Curates.

But sometimes the *Vicaridges* were endow'd, and the very Endowment was express'd in the Grant of the Appropriation, (*viz.*) that the Church should be appropriated, upon Condition that a *Vicaridge* should be endow'd; and this was left to the Care of the Bishop.

But whenever the *Vicar* had a competent Subsistence by Endowment, the *Monks* took all Opportunities to lessen it; and this occasion'd several Decretals, prohibiting such Usage without the Bishop's Consent, and that no Custom should be pleaded for it, where he that serv'd the Cure had not a competent Subsistence.

*And it hath been a Question, whether an Appropriation is good where there is no Endowment of a *Vicaridge*, because the

(*y*) Horn. Chron. de rebus gestis Abbat Sancti Augustini.

Statute of *H. 4.* positively provides that *Vicaridges* shall be endow'd.

But it is now settled, that if 'tis a *Vicaridge* (?) in Reputation, and *Vicars* have been instituted and inducted to the Church, it shall be presum'd, that the *Vicaridge* was originally endow'd.

Thus much for the Tythes ; but the Abbot and Convent had not only the Tythes of the appropriated Churches, but the Right of Patronage too ; for that was extinct, as to the former Patron by the Appropriation, unless he had reserv'd the Presentation to himself, and that made the Advowson disappropriate, and the Church presentable (a) as before, but not by the old Patron, but by the Abbot and Convent, who were then bound upon a Vacancy, to present a Person to the Bishop.

Sometimes the Bishop would refuse the Person presented, unless they consented to such an Allowance for his Maintenance as he thought fit, and therefore they would present none.

This occasion'd the making another Decretal, which gave the Bishop Power to present ; but this did not often happen, because, as I observ'd, the *Monks* were favour'd by the Bishops ; I mean the poorer Sort, for the Rich would not accept his Kindness. They always got their Appropriations confirm'd by the Pope, and their Churches exempted from the Jurisdiction of the Bishop.

But now all those Exemptions are taken away by the Statute 31 *H. 8. cap. 13.* and the Ordinary is restor'd to his ancient Right.

Before I shall give an Account of that Statute, I think it not improper to mention the Forms of Appropriations both before and since that time.

A License being obtain'd from the King as supreme Ordinary, and the Consent of the Diocesan, Patron and Incumbent, thereupon the Bishop made the Grant in these Words :

Auctoritate nostra ordinaria, Ecclesiam parochialem de H. priori & conventui L. annedimus appropriamus & unimus per presentes, &c. as before is set forth in this Title.

And tho' by the Statute * 28 *H. 8.* those Bulls are made void, yet they may be pleaded by way of Inducement to a Title ; as where the Archbishop of *Tork* libell'd for a Pension, setting forth that the Church of *Rillington* was appropriated by Pope *Clement VI.* to the Abbey of *Belland*, upon which Appropriation the Abbot granted a Pension to such an Archbishop : † This is only an Inducement to the Title which is founded upon the Grant of the Abbot, and 'tis necessary to set forth the Appropriation of the Church, for till that was appropriated the Abbot could not grant a Pension out of the Tythes.

(?) 2 Cro. 252. 517. Hardr. 328. (a) Still. 201. * 28 *H. 8. cap. 16.* † 2 Lev. 251.

After the Statute 31 H. 8. the Form of an Appropriation was in these Words: *¶ Sciatis quod nos dedimus, &c. Decano & capitulo ecclesie Cathedralis C. &c. advocacionem, &c. Rectoriam & ecclesie parochialis de H. in Com. S. habend. & tenend. &c. iisdem Decano & capitulo & Successoribus suis in perpetuum & ulterius sciatis per presentes quod nos de gratia nostra speciali ac auctoritate nostra Regia, suprema & ecclesiastica qua nunc fungimur pro nobis, Heredibus & Successoribus nostris, concedimus & Licentiam damus predict. Decano, & Capitulo & Successoribus suis, Rectoriam & Ecclesiam predict. quando per mortem resignationem vel deprivationem, aut per aliquem alium modum quemcunque vacare contigerit, immediate in suos proprios usus tenere sibi & Successoribus suis in perpetuum possim & valeant absque Molestatione & Impedimento nostro, Heredum aut Successorum nostrum, ac hoc absque aliqua Presentacione inductione sive admissione alicujus incumbens ad eandem Rectoriam extunc in posterum fiend. ac ulterius.*

By the aforesaid Statute, those Appropriations which were made formerly by Bishops, and enjoy'd only by Religious Houses, are now become the Inheritance of Laymen; and tho' the Bishop's Power in such Cases is not mention'd in the Statute, yet the Law leaves all Matters of Right just as they were before; for when those Religious Houses were surrender'd, the King was to have the Tythes in the same manner, as the Abbots had them in Right of their Monasteries; and there is a Saving of the Rights and Interests of all Persons; so that if before the Dissolution the Vicar had an antecedent Right to a competent Maintenance, and the Bishop had Power to allow it, 'tis not taken away now; and this was resolv'd in (*b*) *Hitchcott* and *Thornbury's* Case, where the Parsonage was appropriate to the Master and Choristers of the Cathedral of *Salisbury*, and *Thornbury* was Parson thereof, and *Hitchcott* was Vicar, who libelled in the Spiritual Court for a better Maintenance, and upon a Motion for a Prohibition it was denied, because the Vicar had Reason to Complain, and the Ordinary might compel the Appropriator to make an additional Allowance, for such was reserv'd to him in all Appropriations.

This is the Law of *England*, and 'tis founded on good Reason; for Tythes were originally given for the Service of the Church, and not for the private Use of Monasteries; and it may be a Question, whether a Monastery was capable of taking an Appropriation, because 'tis not an Ecclesiastical Body; for by the Canons they could not preach, baptize, or visit the Sick, and they had no Cure of Souls.

The Bishop of *Worcester* (*c*) tells us, this Matter was disputed between *St. Bernard a Cistercian Monk*, and *Petrus Cluniensis*; the First was dissatisfied that Monks should take Tythes

¶ West. Tymbol Plito 339. (*b*) 2 Rol. Abr. 337. (*c*) Still. Eccles. Cases 205.

from the Secular Clergy, which was given to support them in attending the Cure of Souls; the other answer'd him, that Monks pray'd for Souls, but Tythes were not only given for Prayers, but for Preaching, and to support Hospitality. Upon the whole Matter Appropriations may be made by the joint Consent of the Queen, the Ordinary, and the Patron who hath the Inheritance of the Advowson; and he must have the Queen's License, because she hath an Interest in it as supreme Ordinary; for it might happen that the Presentation may be devolv'd on her by Lapse, and such License was usually granted when the Church was void; but if 'tis granted when the Church is full, it doth not make the Appropriation void; tho' such Grant should be in general Words, because where it may be taken in two Intents, the one good; the other not, it shall be expounded in that Sense which may make the Grant good; 'tis true, the best way is to give a License in particular Words, importing that the Appropriation shall take Effect after the Death of the Incumbent; however, if 'tis a License *Per verba de presenti*, yet 'tis good for the Reason already mention'd.

The Bishop must likewise concur, for he hath an Interest in the Presentation, which may come to him by Lapse before it can be vested in the Queen; besides, an Appropriation deprives him of Institution, for it doth not only carry the Glebe and Tythes, but gives to the Corporation a Spiritual Function, and supplieth the Institution of the Ordinary: For in the very Instrument of Appropriation 'tis united and given to the Body corporate *In proprios usus*, that is, that they shall be perpetual Parsons there; this must be intended where there are no Vicaridges endow'd, and yet they cannot have the Cure of Souls, because they are a Body Politick; but the Vicar who is endow'd and comes in by their Appointment hath the Cure.

And now I have mention'd a *Cistercian Monk*, I shall add something of that Order relating to this Matter.

When those Monks first came into *England*, they were very scrupulous of Appropriations, and pretended to live only on the Rents of such Lands as were given to them, and by this Means they ingratiated themselves to the People, and got more Lands added to their Possessions.

But when once they became rich by such Gifts, they procur'd large Privileges from the *Pope*, and in particular to have their Lands exempted from Payment of Tythes, which continue so to this very Day.

I shall mention one Law Case pertinent to this Purpose, and so conclude this Title.

The Rectory of *Harfield*, (*d*) and a Farm call'd *Downhall*, were appropriated to the Priory of the same Place; the Farm paid Tythes before the Appropriation, but afterwards it

(*d*) Hob. 307. 2 Cro. 607.

did not, because what a Man hath cannot be paid to himself.

The Priory was dissolv'd by the Statute 27 H. 8. and the King granted the Rectory to *Trinity-College* in *Cambridge*, and the Farm to *B.*

The College su'd *B.* for the Tythes of the Farm being in the same Parish with the Rectory; and the Question was, Whether it was discharg'd of Tythes by Unity of Possession? That is, since the Prior had both the Rectory and Farm; and since he could not pay Tythes to himself, Whether now it should be discharg'd by reason of the Unity? * And held not, because 'tis not properly a Discharge, but a Suspension of the Payment for a time.

'Tis true, the Prior was seiz'd of an equal Estate in the Farm and Rectory, but still it was in different Capacities, for the one was united to him in his temporal, and the other in his spiritual Capacity:

But when the Lands came into the Hands of one Person, and the Rectory into the Possession of another, then Tythes became again payable out of the Land.

Archbishops.

IT may not be improper under this Title to examine the Monkish Story of *Lucius*, (*f*) who is said to be our first Christian King, and who liv'd here whilst *Commodus*, but others say whilst *Antoninus Pius*, was Emperor; but I shall not controvert whether Christianity was planted here before that Time, tho' most of our Historians agree it was.

Bede, (*g*) who is one of the most ancient Writers of the *English* Nation, and who liv'd Five hundred Years after this *Lucius* (if ever there was such a Person) is the first who mentions him; and if he took the Story out of the *Gesta Pontificum*, 'tis probable it may be false, and the rather, because *Gildas*, who liv'd before him, takes no Notice of any such King.

The common Tradition is, that this King *Lucius* sent two Persons to *Eleutherius*, then Bishop of *Rome*, to beseech him, that by his Means he might be made a Christian.

The Pope could not, at that time, deny so reasonable a Request, and therefore baptiz'd them both, and then made one a Bishop and the other a Presbyter, and sent them back into *England* to preach to King *Lucius* and his People, and to baptize them.

But this Matter was not intrusted to the Care of those two Persons alone, but the Pope sent two more to assist in this great Work, whose Names were *Faganus* and *Damianus*.

After the People were by their Preaching converted from Paganism and baptiz'd, these holy Men consulted with the King

* *Memoir 532: (f) Usher de Antiq. Britan. cap. 3. (g) Lib. 1.*

to erect Episcopal Sees in the most convenient Places of this Kingdom; the Result of which was, that the King, finding three Cities of great Eminency, where the Heathens had built and endow'd so many Temples, and where their Chief Priests, call'd *Archflamins*, offer'd Sacrifices to Idols, did there erect three Archbishopricks, *London*, *Tork* and *Landaffe*, call'd then *Caerleon upon Uske*.

That the Dignity of the Archbishop of *London* continu'd in that See for 180 Years or thereabouts; and the Cathedral was that which is now * *St. Peter's Church* in *Cornhill*, till King *Ethelbert* built *St. Paul's*; and so it remain'd till the Time of the *Saxons*, when *Augustine* translated the Pall to *Canterbury*, which has continu'd the Seat of an Archbishop ever since: But before the coming of *St. Austin* these *British* Bishops acknowledg'd no Superior in Spirituals, but the Archbishop of *Landaffe*: Under whose Government they were, till that Archbishoprick was translated to *St David's*, and afterwards, in the Reign of *H. 1.* made subject to the See of *Canterbury*; as likewise were the other Bishopricks in *Wales* at the same time.

But *Tork* remains a Metropolitcal See to this very Day; and the aforesaid † *Faganus* is mention'd by our Historians to be the first Bishop thereof.

The King likewise, finding Twenty Eight other Cities of great Note, where other *Pagan* Priests, call'd *Flamins*, were seated, and where Temples were dedicated to their Idols, converted them all into Christian Churches, and plac'd so many Bishops there; and this is the first Account of any Archbishops here; tho' some learned Men are of Opinion, that an Archbishop is a Dignity as ancient as the Apostles Time, for there were *Primi Episcopi* then, tho' the Name of Archbishop was not known till some Ages afterwards.

That the Apostle himself gave the first Model of this Government in the Church, by vesting *Titus* with a Superintendency over all *Crete*, that these Governours were afterwards called Princes and Monarchs of the Priests; but because these were Titles applicable to temporal Powers, it look'd as if they affected secular Grandeur, and therefore these Appellations were prohibited by subsequent Councils, and soon after they were call'd Archbishops.

The learned ‖ *Glossographer* tells us, it was a Title first known in the *East* Part of the World; and that one *Symion*, who liv'd in the Reign of *Constantine*, was call'd by *Sozomen* the Historian Archbishop of *Seleucia*, because he presided over the chief Cities of *Persia*.

But (a) *Epiphanius* tells us, that *Peter* Bishop of *Alexandria* was dignified with the Title of an Archbishop in the Reign of

* *Selden Polyolbion* 129. † *Heyl of Episc.* 265. ‖ *Spelm. in verbo.* (a) *Panacher* 68, fol. 318.

Dioclesian, who govern'd the Empire about 22 Years before *Constantine*, under whose Reign the Church had some Respite from Persecution; and about One hundred Years afterwards Pope *Zepherinus*, in his first decretal Epistle, took upon himself that Title; and afterwards, when the Church was free from Persecution, then we read of *Metropolitans*, for such there were in the great *Nicene* Council, it being about that Time when he who was Bishop of the capital City of a Province had the Inspection and Superintendency over all the Bishops in that Province, and from thence he was call'd a *Metropolitan*.

I know 'tis a Question whether there were any Archbishops in the Western Church at that Time; 'tis agreed on all Hands that such there were in the Eastern Church a long Time before: But some Men will not admit that decretal Epistle of *Zepherinus* to be genuine; 'tis true, *Bede* tells us that *St. Augustine*, who liv'd 200 Years after that Pope, was the first Archbishop here, and that he was ordain'd to that Dignity by the Archbishop of *Arles*; but this must be understood of the manner of speaking in *Bede's* Time, which was about 300 Years after *St. Augustine*, for when he liv'd there was no Archbishop in the Western Church; 'tis plain that neither the Bishop of *Arles* or *St. Augustine* were such; for if they had, 'tis probable that *Gregory* the Great would have given them that Title in some of his Epistles, which he has not done, neither doth *Marcellus*, who liv'd in that Age, take Notice of any such Dignity in the Western Church; but 'tis certain, that when Heresies and Schisms broke in upon the Church, which was chiefly occasion'd by Churchmen themselves, it seem'd necessary to fix a Metropolitan in every Province, and 'tis as certain that this was done in the 3d Century; for the Apostolical Canons, which were the Rule of the *Greek* Church in that Age, mention a *Chief Bishop* in every Province, and most of them about the 8th Century assum'd the Title of Archbishops; some of which were so in a more eminent Degree, viz. those of *Rome*, *Constantinople*, *Antioch* and *Alexandria*, which were the four Principal Cities of the Empire, and to these the Archbishop of *Jerusalem* was added, because that was the Capital City of the Holy Land, which five were call'd Patriarchs.

But to return; Those, who oppose this Story of *Lucius*, say, That he could not be a King over all *Britain*, because it was then a *Roman* Colony; and 'tis improbae that the Heathens should entrust him with so great a Power to rule here, or suffer one, who was but a Tributary Prince himself, to make so many Christian Archbishops and Bishops at once, in order to propagate a Religion which they themselves did not tolerate.

This seems to be a plausible Argument; but *Dr. Heylin* * answers it by telling us, that *Lucius Verus*, who was then an *As-*

sociate in the Empire, after he had put an End to the *Partibian* War, gave the Government of those Kingdoms, which he had subdu'd, to tributary Kings, and the Government of Provinces to Lieutenants.

So that *Lucius* might be a King notwithstanding the Nation was tributary to the *Romans*, and Archbishop *Usher* (*m*) proves there was such a King, by the Coins which he had seen both of Gold and Silver, having an Image of a King and a Cross on them, and the Capital Letters *L. V. C.*

But if he was a King he rul'd only in *Sussex* and *Surrey*, because that Part of the *British* Nation was not inhabited by the *Romans*, for none of their Highways, Buildings, Urns, Coins, or Inscriptions, were at any Time found in those Parts, except towards the Sea-side, and there they had some Forts and Garrisons; and particularly at *Aldrington* near *Shoreham* in *Sussex*, which was then call'd *Portus Adurni*.

So that being secure of the Coasts, (*n*) and having Soldiers dispers'd in the Colonies about them, and being near *London*, they might permit a *British* King to govern those Parts, tho' they would never suffer a Native over the whole Nation.

But *Heylin* has given no Answer to the other Part of the Story of making so many Archbishops and Bishops here, he rather thinks it too great a Task for a Tributary Prince to spread Christianity so far at once over the Island, and therefore was of Opinion, that the *Monkish* Writers attribute this to him, as being the first Promoter of so great a Work, as *Rome* is said to be built by *Romulus*, who never built Half of it.

Upon the whole Matter, there is not much Credit to be given to this Story of the *Archflamins* and *Flamins*, because we do not find the first of these Words in any *Roman* History; it seems rather to be an Invention of *Jesserey* of *Monmouth*, who would have in every City several Colleges of *Flamins*, according to the Number of their several Gods.

The Number of the *Archbishops* and *Bishops* here seems more properly to relate to the Civil Form of Government, which was establish'd in the *Roman* Empire; which Empire was divided into Fourteen great Portions call'd *Diocesses*, and those were subdivided into Provinces, in which there were several Cities.

This Division was made by *Augustus Caesar*, and the chiefest City of Trade was call'd the *Metropolis*; in which the Governor of the Province usually resided, and in which the Apostles themselves plac'd the Bishops of the greatest Abilities, to whom the other Bishops of that Province gave that Reverence and Respect which was due to their Merits; and because the most important Affairs of the Church were transacted in Assemblies,

(*m*) *Usher* de *Primordiis* 39, 40. (*n*) *Still. Origin. Britan.* 61, 62.

which met and consulted thereof in those chief Cities, therefore it was necessary that the Bishop who was plac'd there should be the first Man in Dignity, and preside in those Councils, and have Authority to summon them upon any Occasions relating to the Discipline and Government of the Church, and for this Reason they were call'd *Primates*.

Afterwards, wherever the Heathens had a *Defensor Civitatis*, the Christians, when they got that City, did ordain a Bishop; and in every Province where the Romans had a President, there the Christians did place an Archbishop; whose Seat being commonly in the chief City of the Province, as aforesaid, he was from thence call'd a *Metropolitan*: And in every Diocess where the Romans had a *Lieutenant*, there the Christians had a *Primate*, and seated him in the same City with the *Metropolitan*. 'Tis very certain that in the first Ages of Christianity all Bishops were vested with the same Authority; and there being at that Time a Parity amongst them, no one had a Power over another of that Order.

But some were Superior to others in Place, as I have already mention'd, and it was that Primacy of Place which was afterwards attended with the Prerogative of Presiding in Ecclesiastical Assemblies, as hath likewise been observ'd before, and also with the Privilege of Consecrating every Bishop within their Provinces, of Summoning Provincial Synods, of visiting the whole Province, and of citing any Diocesan Bishop to hear and determine their Causes before the Metropolitan; and many other Privileges, of which those before-mention'd are the Chief.

But to return, *Britain* was then a Diocess divided into three Provinces, in which there were Twenty eight Cities, and of those Cities the three above-mention'd were the chief, and from thence we had *Archbishops* and *Bishops* here.

We have now in *England* two Archbishops and no more,

CANTERBURY,

TORK,

And First, I shall give an Account,

- (1.) When the Archbishoprick of *Canterbury* was founded,
- (2.) I shall treat of the Stile of the Archbishop,
- (3.) Of his Precedency before *Tork*,
- (4.) Of his Privileges,
- (5.) Of his Jurisdiction.

When the Archbishoprick of Canterbury was founded.] As to the First of these Things I find, that, from the Time of the aforesaid *Lucius* to the Persecution of *Dioclesian*, Christianity had been preserv'd in this Nation, but then it was almost extirpated

ted and continu'd under Paganism above twenty Years, till it recover'd a little Life under *Constantine* the Great, but then it was infected with the Heresies of *Pelagius* (o) a *British* Monk, whose *Welsh* Name was *Morgan*.

That Heresy being condemned by the 5th General Council of *Carthage* and *Mela*, and baffled by the Arguments of *St. German*, Bishop of *Auxerre*, and of *Lupus*, Bishop of *Troyes* in *France* (who were sent from thence by a *Synod*) at a publick Disputation held at *St. Albans*, the Christian Religion became again in some Repute, till suppressed by *Vortiger* and the Heathen *Saxons* for above one hundred Years, and until Pope *Gregory* sent *St. Augustine*, a Monk, to convert this Nation.

The Monk was received very kindly by *Ethelbert*, then King of *Kent*, who gave him a Place in *Canterbury* to erect a Bishop's See, and there he fix'd his Seat, but was not, as some Writers would have it, the first Archbishop thereof, for the Priests would not acknowledge him as such; neither did that Pope give him that Title, tho' he gave him the *Pall* and Supremacy over *York*, and over all the *British* Bishops.

Neither doth *Marculfus*, who liv'd in that Age, mention any such Title.

'Tis true, he was the first Bishop of that Place, but *Theodore*, who was the Sixth in Succession to him, was the first Archbishop, and his Successors have been so ever since.

Title of the Archbishop.] (2.) Next I shall mention his Title.

He had anciently Primacy over *England* and *Ireland*, and all the Bishops of the last Place were consecrated by him.

By the two first *Norman* Kings he was declar'd to be Metropolitan, and was afterwards stil'd by *Urban* the 2d, *Alterius Orbis Papa*.

He is call'd by *Eadmerus*, *Princeps Episcoporum*, *Angliae Pontifex*, *summus Patriarcha*: And the Records of Ecclesiastical Matters were dated *Anno pontificatus nostri primo*.

He had, tho' not at first, a perpetual *Legatine* Power annex'd to his Archbishoprick, and was therefore call'd *Legatus natus*.

He had some Marks of Royalty, as to be Patron of the Bishop of *Rocheſter*, to coin Money, &c.

Since the Reformation he is stil'd Primate and Metropolitan of all *England*; and Archbishop *Cranmer* was the first who had this Title.

Of his Precedency.] (3.) Next, as to Precedency, I find there have been ancient Contests between these two Archbishops, about the Oath of Canonical Obedience and Precedency.

Thus in the Reign of *William the Conqueror*, *Thomas*, then Lord Archbishop of *Tork*, came to be consecrated by *Lanfrank*, Archbishop of *Canterbury*, who demanded of him a Declaration of his Canonical Obedience in Writing, and that he would confirm it by Oath.

But *Tork* refus'd it without some positive Proof that it was his Duty so to do; thereupon the Matter was referred to the King, who ordered *Tork* to subscribe the Declaration, which he did, but with a Protestation that it should not be prejudicial to his Successors without better Proof.

This was again demanded by Archbishop *Anselme*, in the Reign of *H. 1. (p)* and the King, after the Death of that Archbishop, commanded the Elect of *Tork* to acknowledge *Canterbury* as Superior before he should be consecrated.

About seven Years afterwards, and in the Reign of the same King, the Controversy was renew'd by *Thurstan* of *Tork*; and the King declar'd, that if he would not acknowledge the Superiority to *Canterbury*, he should not be consecrated; which *Tork* refus'd, and went to *Rome*, where he was consecrated by the Pope himself; and thus, notwithstanding all these solemn Determinations, the See of *Tork* became independent, and this made *William Corbell*, who was Archbishop of *Canterbury*, take a Journey to *Rome*, to get the Character of Legate, which he obtain'd, and was the first Archbishop upon whom that Honour was conferred; and by this Means he secur'd the Superiority, and did afterwards, *Jure Legationis*, visit the Province of *Tork*, and summon'd that Archbishop and his Clergy to Councils, and would not suffer him to carry up his Cross in his Province, when he either attended those Councils or the Parliament; and therefore the King, to preserve the Peace, did usually send Writs to the Archbishop of *Canterbury*, prohibiting him to disturb the other upon this Occasion. *Pryn. 409. Hovenden 758.*

The like Contention there was always between these two Archbishops concerning Precedency, about which we meet with a very extraordinary Story, which was thus; In the Reign of *H. 2.* one *Hugeson*, the Pope's Legate, call'd a Synod at *Westminster*, where all the Bishops of *England* met.

The Archbishop of *Canterbury*, coming first, sat down at the Right Hand of the Legate; and *Tork*, coming afterwards, refused to take the Seat vacant for him on the Left Hand, and demanding the Place where (q) *Canterbury* sat, did, upon his Refusal, sit down in his Lap.

This occasion'd the Synod to break up in Disorder, and both Parties appealed to the Pope; and about four Years after this Quarrel the Matter was settled, that neither should require Canonical Obedience of each other, but that *Tork* should be subject to *Canterbury*, and so it continues to this very Day.

(p) Eadmerus 104. (q) Tyor 407.

His Privileges.] (4.) In the next Place I shall mention some of the Privileges of this Archbishop.

He hath a Privilege to qualify Eight Chaplains, when the greatest temporal Peer can qualify but Six.

He hath a Privilege to crown all the Kings of *England*; and, before the Court of Wards was taken away, he had the Wardship of those that held Lands of him.

He hath the Privilege to have Prelates to be his Officers; as for Instance;

The Bishop of *London* is his Provincial Dean.

The Bp. of *Winchester* is his Chancellor.

The Bp. of *Lincoln* is his Vice-Chancellor.

The Bp. of *Salisbury* is his Præcentor.

The Bp. of *Worcester* is his Chaplain.

The Bp. of *Rocheſter* carried the Croſier before him in the Days of Popery.

His Jurisdiction.] (5.) Laſtly as to his Jurisdiction, 'tis to be obſerv'd, that, next to the Queen, he hath the Supreme Government in all Eccleſiaſtical Matters within his Province; but before the Reformation he had a larger Extent of Power; And this appears by a Paragraph in the *Cottonian* Copy of the *Saxon Annals*, (*viz.*) that, at a Council ſummoned by *Wiſfred* King of *Kent*, he declared that the Archbishop ſhould, upon the Death of a Biſhop or Abbot, &c. chooſe another; and that none ſhould be Elected, or Conſecrated without his Conſent; and even at this Time he hath a Right of Conſecrating all his Suffragan Biſhops, which Right he hath by Cuſtom immemorial. In the aforeſaid Council it was declar'd, that as it was the King's Duty to govern the State, ſo it was the Duty of the other to govern the Church.

And as to this Matter he hath two concurrent Juridiſdictions; one as Ordinary of the Biſhop himſelf within his Dioceſs, the other as Superintendant throughout his whole Province of all Eccleſiaſtical Matters, both to correct and to ſupply the Defects of the Ordinary; and therefore, if he grant Inſtitution to a *Peculiar*, 'tis not void, becauſe he hath Juridiſdiction all over his Province; 'tis true, 'tis voidable, like a Sheriff executing Proceſs (r) in a Franchiſe, which is not void, but voidable.

Before the Reformation he had a concurrent Juridiſdiction with the Biſhop of every Dioceſs in his Province, but that was not by his Prerogative as Archbishop, but as he was *Legatus natus*; but now no Man is to be cited out of the Dioceſs (ſ) where he lives.

Upon the Death of any ſuch Biſhop, the Cuſtody of his See, and his Juridiſdiction, devolves upon the Archbishop, by the Cuſtom of *England*; but then he muſt hold his Courts within that Dioceſs, where the inferior Ordinary had Juridiſdiction; except

(r) Lev. 212. (ſ) 23 H. 8. cap. 9.

in the Diocess of *London*, (1) where, by Composition between the Archbishop and that Bishop, Suits arising within his Diocess, are to be determin'd in the Arches, and that is the Reason that he never visits *London*.

He may grant a Dispensation to hold in *Commendam*, and generally in any Case where Dispensations were grantable before the Statute; and therefore he may dispense with a Clergyman to hold two Livings: But such Dispensations must be licensed by the Queen in Chancery, if the first Living is above 8 *l.* and this as well within the Province of *Tork* as of *Canterbury*.

Panormitan calls him *Ordinarius totius Provinciae*, for he hath a Jurisdiction, *Nolente Ordinario*, as in Cases of Visitation; and this is a Right which is vested in him by Custom; and when he visits he hath Power of Censuring any (u) Bishop in his Province; he hath likewise a Jurisdiction in Causes between Parties, as in Cases of Appeal, where there is a suppos'd Default of Justice in the Ordinary; and this is likewise a Right which he hath by Custom Time out of Mind.

When he visits an inferior Diocess, (x) if he should inhibit the Bishop during such Visitation, and he should happen at that Time to have a Title to present by Lapse, he cannot do it; but he must present the Clerk to the Archbishop, because during the Inhibition, the Bishop's Power is suspended.

He hath exempted Churches in several Diocesses not visitable by the Ordinary, but by himself alone; he hath an ancient Right to preside in all Provincial Councils of his Suffragans, which formerly were held once in a Year, but have been discontinued a long time, so that his Power of examining Things thro' his Province is now devolv'd to his Courts.

Then as to the Estates of dead Men, if there is no Will, and the Intestate hath Goods in several Diocesses, the Administration belongs to the (y) Archbishop; but if there is a Will, and the Testator had Goods of the Value of 5 *l.* out of the Diocess where he died, or 10 *l.* within the Diocess of *London*; or if he was a Bishop, the Probate of such Will must be in the Prerogative Court of the Archbishop of *Tork*.

Some Antiquaries will have it, that the Archbishop of *Tork* was originally Primate of the *British* Church; for tho' *London* was a Place of great Trade, yet it was never a *Roman* Colony, or a Seat of the *Roman* Emperors, as *Tork* was, where both *Severus* and *Constantius Chlorus* lived and died, and where *Constantine* the Great was born; and from hence they infer, that where the Emperors resided, that was the most likely Place to have Pre-eminence above the rest.

I cannot think this to be a tolerable Reason for the Primacy of *Tork*, but must admit that it was a Seat of those Emperors

(1) Cro. Car. 340. (u) Hob. 185. (x) 2 Rol. Abr. 357.
(y) Sid. 90.

only for their Conveniency in attending the Wars against the *Northern Britans*; it was a very agreeable Place for them to give Directions, and to send Supplies to their Armies, and this was the chief Occasion of their living there.

But the Pre-eminence of Places amongst the *Romans*, (?) tho' they were a very Warlike People, did not depend upon the *Military*, but upon the *Civil Officers*; and that where the Court of Judicature was, there was also the *Metropolis*, and that was at *London*, because of its convenient Situation for Trade; it was therefore call'd *Augusta*, which Word implies that it was the Imperial City of *Britain*, for none had that Denomination but those which were *Capita Gentium*.

But not to enter any farther into Enquires after such remote things, the Archbishop of *York* is now stil'd Primate and Metropolitan of *England*, tho' not of all *England*, and was formerly *Legatus natus* to the Pope.

He takes Place of all Peers except *Camterbury* and the Lord Chancellor.

He grants Dispensations of Non-residence for some time; and that Persons may be made Deacons, tho' under the Age required by the Canon, and likewise for marrying in Times and Places not allow'd by that Law; and this all other Bishops may do, because it was done before the Statute 25 *H. 8. cap. 21.* which gives them Liberty to dispense in such Cases as formerly they used.

Archdeacon.

THIS is a Name of Dignity, and not only so, but 'tis *Dignitas principalis post Episcopum in Ecclesia*, and usually hath some Spiritual Promotion appendant to it; and the Person himself hath formerly been esteem'd such an eminent Dignitary in the Church, that *Philip*, one of the Sons of *Lewis* the Gross King of *France*, took upon him the Office of Archdeacon of *Paris*.

'Tis certain that an Archdeacon is a very ancient Officer in the Church; for we find that *Anastasius*, in the Life of Pope *Sixtus* the 2d, called one *Laurentius*, Archdeacon of *Rome*, who suffered in the Year 260; and Pope *Damasus*, about One hundred Years afterwards, called *Stephen*, the Protomartyr, an Archdeacon.

St. Jerome, in his Epistle to *Evagrius*, (a) tells us, that the *Deacons* chose one of the most Eminent amongst them whom they call Archdeacon; so that 'tis plain there were such Officers about the End of the 4th Century, but they had not then any Jurisdiction in the Church, for they only attended the

(?) Still. Orig. Brit. 195. (a) Epist. 85.

Bishop at Ordinations and other publick Solemnities in the Cathedrals.

Afterwards, when the Annual Visitations of Bishops came to be inconvenient, because of the Grandeur and Charge of their Attendance and Retinue; when the *Chorepiscopi* were laid aside, because they assum'd those Powers which did not belong to them, (for they were Persons only appointed and consecrated in the Primitive Times for the Ease of the Bishops in Matters of Orders and not of Jurisdiction; but being always near their Persons did encroach upon some of their Powers;) and when the *Norman Bishops*, by reason of their *Baronies*, were to attend the Kings in their Parliaments, then *Diocesses* were first divided into *Archdeaconries*, and the Bishops sent Archdeacons in their Room, who visited when they did not; and Archbishop *Lawfrank*, who liv'd in the 11th Century, and in the Reign of *William the Conqueror*, is by some affirm'd to be the first who gave an Archdeacon any Manner of Jurisdiction.

But this doth not consist with the (b) Conqueror's Writ, which is thus, (*viz.*) *Nullus Episcopus vel Archidiaconus de legibus Episcopaliibus amplius in hundredo placita teneat*, which he tells us was an Usage *In regno Angliæ usq; ad mea tempora*; from whence it may be inferred, that Archdeacons had Jurisdiction here in the Times of our *Saxon* and *Danish* Ancestors.

And Sir *Henry Spelman* is of the same Opinion, that Archdeacons in those very Days had a superintendent Power over all Parochial Persons in every Deanry in their Precincts.

But the Power which he hath is deriv'd from the Bishop, for 'tis he who collates to the Archdeaconry; and after some Ceremonies the Dean and Chapter inducts the Archdeacon by placing him in a Stall in that Cathedral to which he belongs; so that his Promotion is not only to a Spiritual Office, but he hath, *Locum in choro*, by such Induction, which is the reason that a † *Quare impedit* may be brought against any Man who shall disturb the Bishop to collate to an Archdeaconry.

Whatever Jurisdiction they had before the Conquest, it cannot be denied but that they had some afterwards; for before the Clergy had any Proctors of their own, they were represented in Convocation by the Archdeacons, to whom they gave Letters of Proxy to act in their Behalf.

Thus it was, *Anno 22 H. 1.* which is the first Account we have of their being summon'd to the Convocation; but *Anno 15 H. 3.* they were summon'd by express Name, (*viz.*) there was *Ingens consistorium Abbatum & Archidiaconorum* at *St. Albans*; and *Anno 32.* of the same King, he summon'd *Magnates suos nec non Archidiaconos*, &c.

(b) Rights of Con. 321. † Cro. Eliz. 207. 1 Leon. 205, 1 And. 243. 2 Rol. 350. Owen 99.

This being the Original of (a) *Archdeacons*, 'tis impossible for them to prescribe to an Independency on the Bishop, as it was declared in a Court of Law they might, and endeavoured to be proved by the Gloss on a Legatine Constitution, where we read that an Archdeacon may have a customary Jurisdiction distinct from the Bishop, and to which he may prescribe.

But the meaning of it is not that there can be an Archdeaconry by Prescription, and independent on the Bishop, but that the Archdeacon may prescribe to a *particular Jurisdiction*, exempt from the Ordinary; which Jurisdiction hath customarily been enjoyed by him and his Predecessors Time out of Mind.

Thus the *Archdeacon* of *Richmond* (b) may prescribe to grant Institutions to Benefices, but he had that Power originally from the Bishop, because the Jurisdiction of the whole Diocess was in him before there was an *Archdeacon*; but the Grant which he had being lost, and it being customary for him to institute, by vertue (as it must be supposed) of such original Grant, he may therefore prescribe to do it.

So likewise the *Archdeacon* of *Cornwall* hath a particular Jurisdiction to grant Probates of Wills, which other Archdeacons have not.

All these Jurisdictions are founded upon ancient Customs, but still subordinate to the Bishop; for so is the Archdeacon in our Law, and so he is likewise by the Canon Law, for he is *Vicarius Episcopi*; and no longer ago than in *Lyndwood's* Time he had not Power to pass Censures in his own Name, but for some small Fault, nor then neither, but where there was a Custom to warrant him so to do; he could not visit *de comuni jure*, but as the Canonists call it, *per modum scrutationis simplicis*, that is, he could enquire into the Crimes, but could not Punish the Criminals.

But because he hath in one sense, according to the Casuists, a cure of Souls, by vertue of his Office, tho' 'tis *in foro exteriori tantum & sine pastoralis cura*; and having Authority to perform Ministerial Acts, as to Suspend, Excommunicate, Absolve, &c. therefore by the Ecclesiastical Law he is obliged to Residence. And that may be one reason why he shall not be chosen to execute any Temporal Office that may require his Attendance in another Place; another reason is because he is an Ecclesiastical Person, and therefore the (c) *Archdeacon* of *Rocheſter* had a Writ of Priviledge to be discharged from the Office of *Expenditor* in *Romney-Marsh-Level*, especially since all the Land which he had in that Level was leased out for 99 Years.

But he hath no *Parochial Cure*, and therefore an *Archdeaconry* is not comprehended under the Name of a *Benefice with*

(a) 2 Vent. 189. 269. (b) 2 Rol. Rep. 150. 449. (c) 1 Lev. 303.

Cure; for if one who hath such a Benefice accepts an Archdeaconry, 'tis not void by our Law, tho' 'tis so by the Canon Law; and that may be the reason of the Proviso in the Statute 21 H. 8. cap. 13. by which 'tis enacted, that it shall not be taken under that Name. And yet tho' he hath not *any Parochial Cure*, he is obliged to subscribe the Declaration, pursuant to the Statute, 14 Car. 2. 'Tis true, he is not expressly named therein; but all Persons in *Holy Orders* are enjoined to subscribe by that Statute; and because an Archdeacon must be in those *Orders*, therefore he must likewise subscribe, &c.

And as he hath a Jurisdiction in certain Cases, so for the better exercising the same, he hath Power to keep a (d) Court, which is called the Court of the Archdeacon, or his Commissary; and this he may hold in any Place within his Archdeaconry, and there he may determine Spiritual Causes; but such Judgment is not final, for there lies an Appeal from his Sentence to the Bishop of the Diocese, and not to the Archdeacon, because the Archdeacon's Power was derived from the Bishop, and therefore his Acts must be subordinate to him.

There is an Officer belonging to this Court, called a Register, (e) whose Office concerns the Administration of Justice, and therefore the Archdeacon cannot by Law take any Money for granting it, if he doth the Office will be forfeited to the Queen, and not to the Bishop; that is, the Grant is void, and because the Archdeacon hath by this means disabled himself, therefore the Power to supply the Office is devolved upon the Queen as Supreme Ordinary.

Lastly, He claims *Synodals*, which is a Tribute paid to him by the inferior Clergy for his *Easter Visitation*: 'Tis paid by no certain Rule that I can find, but by some ancient Taxation of which there are no Footsteps.

Sir *Simon Degg* is of Opinion, that it may be paid as a Contribution to their Charge in attending the *Synods*, they being, in former Times, chosen by the Deacons, and sent thither as their Representatives.

But if I may have leave to conjecture, it was thus: 'Tis a Tribute originally given to the Bishop, at the assembling a Synod within his Diocese, which he was formerly obliged to do once a Year, and then a certain Sum was paid to him by the Clergy, as a Token of their Subjection.

Those Synods were usually held in the Cathedrals, and the Bishops presided in them; but after the Conquest, his Attendance being required at the King's Court, 'tis probable he might delegate Archdeacons to sit in his Room, for they being always near the Bishop, had very much improved their Interest and Power with him; and from thence 'tis that Archdea-

(d) 4 Inst. 339. Hob. 16. 24. H. 8. cap. 12. (e) 3 Lev. 289. 2 Vent. 187. 2 Deut. 187.

cons claim *Synodals* at this Time, *De jure communi Ecclesiastico*, which they originally had by Agreement and Composition with the Bishop; which Compositions being now lost, and the Duty being constantly paid, they now claim it by Prescription.

But still they pay a yearly Sum to the Bishop, *Pro exteriori Jurisdictione*; and this is called *Prestation-Money*.

Arches.

THIS is the ancient *Consistory Court* of the Archbishop of *Canterbury*, and 'tis called *Curia de Arcubus*, from *Bow-Church*, where it is kept; and that Church was so called, because the Steeple was formerly raised upon Stone-Pillars built on Arches, like so many Bows bent.

Here Spiritual Causes are debated by *Civilians*, and determined by the Judge, who is called *Dean of the Arches*, because he hath a peculiar Jurisdiction over Thirteen Parishes in *London*, which is esteemed a Deanry, and exempt from the Jurisdiction of the Bishop of *London*; of which the Parish of *Bow* is one and the chiefest.

But the Jurisdiction of this Judge extends thro' the whole Province of *Canterbury*; so that, upon an Appeal made, he sends out a *Citation* to the *Appellee*, and his Inhibition to the Judge, from whose Sentence the Appeal was made; but he is prohibited by the 4th Canon to cite any one who doth not dwell in the particular Diocess, or Peculiar of the Archbishop, without the License of the Diocesan first had and obtained, except only in such Cases which are expressed and reserved in the Statute, 23 *H. 8. cap. 9.* that is, for *Heresy*, &c. the Judge offending shall be suspended from the Exercise of his Office for three Months.

My (f) Lord Coke tells us, the *Dean of the Arches* hath ordinary Jurisdiction in Ecclesiastical Causes at the first Instance of the Party, and by way of Appeal through the whole Province of *Canterbury*; but that his Power to call any Person out of any part of his Province, who lives in another Diocess, is now restrained by that Statute, unless it be upon an Appeal. But his Jurisdiction is the same with the Archbishop's, for what is done by him is intended to be done by the Archbishop. *Shore 251.*

Articles of Religion.

IN the Reign of *H. 8.* there was a Book published, which was called *The Necessary Erudition of a Christian Man*; the design of it was to expose the Errors of the Church of *Rome*, and to condemn those Doctrines which had been generally received by the People, but there was no Assent or Subscription required to this Book.

In the next Reign, when the Worship was more reformed, then were the Articles of Religion prepared; and 'tis generally thought by Archbishop *Cranmer*, and Bishop *Ridley*, the Manuscript was signed by both Houses of Convocation, and published in the last Year of *Ed. 6.*

The Articles were received by the Bishops of both Provinces, and by the Convocation assembled in the 5th Year of the Queen; and being subscribed by them, were then re-published: And about 9 Years afterwards they were re-viewed a second Time by Archbishop *Parker*, and subscribed by him and 10 Bishops in a Provincial Synod, as containing true and sound Doctrine: And these original Manuscripts were given by that Archbishop to *Corpus Christi* College in *Cambridge*, where they now remain; they are 39 in Number, and are Articles of *Church Communion*, as to the Laity; and by the Canon 'tis decreed, that whosoever shall affirm, they are in any part Superstitious or Erroneous, or such which may not with a good Conscience be subscribed, shall be, *ipso facto*, excommunicated.

This Canon relates to the whole Body of the People; and the learned Bishop of *Sarum* tells us, that every Person, who doth not think some Proposition in them to be Erroneous, even to such a degree, that he cannot hold Communion with those who Assent to them, must and is obliged to continue in our Communion. And here I think it not improper to mention what Attempts have been lately made to prove, that the first Clause in the 20th Article is not only Erroneous, but that it was forged, and added to it.

The Clause is thus, (*viz.*) *The Church hath Power to decree Rights and Ceremonies, and Authority in Matters of Faith.* 'Tis objected, that this Clause never passed the Convocation in 1562. when the Articles were subscribed by both Houses of Convocation; nor when they were re-viewed by another Convocation of the Province of *Canterbury* alone, in the Year 1571. and subscribed only by the Archbishop, and 10 of his Provincial Bishops; neither is it in the Book which was ratified by the Parliament in that very Year; for the original Manuscripts, which were thus signed, and left by Archbishop *Parker* to *Corpus Christi* College, have not this Clause in them: And this may be the reason why the printed Book of these Articles, which were ratified by the Parliament, is not to be found among the Records.

In the Reign of *Car. 1.* Mr. *Burton*, who was censured in the Star-Chamber by Archbishop *Laud*, accused the Bishops for forging this Clause: 'Tis true, that Prelate cleared himself from this Imputation; and in his great Zeal for the Clause, affirmed that some old Copies of the Articles were transmitted to him under the Hand of a Publick Notary, with the Clause in them; and that looking himself into the Records at *Lambeth*, he found those Articles of 1562. subscribed by all the Convocation in

1571. and he would certainly at that Time have added a more convincing Proof from the Ratification of it in Parliament *with the Clause*, if the Fact had been so.

But that Archbishop was not consistent with himself; for a Messenger, being sent to him in the *Tower*, from a Committee of the House of Commons in the Year 1642. requires him to give under his Hand what Originals he had of these Articles which were passed in 1562. and re-viewed in 1571. He answered, that he had seen and perused the one at *Lambeth*, but did not remember whether it was signed by the Upper-House, (which, if true, could not be of any Authority against the Originals signed by both Houses) but that *he could never find the other in his Paper-Office, or any where else*; when he had affirmed before that he found those of 1562. subscribed by the Convocation in 1571. My Lord of *Sarum* calls this a Difficulty, and endeavours to give some Account of it by telling us, that after the Manuscript was subscribed by both Houses on *Paper*, (which he admits to be the Original) and *without the Clause*, before it was made up in *Parchment*, it was voted *with the Clause*; for in that very Year the Clause was printed in a *Latin* Edition, when the Matter was fresh in every Man's Memory; and if those *Parchments* were extant, they would clear the Difficulty, but they were burnt in the Fire of *London*.

But all this doth not set the Matter in a much clearer Light; for in the first place, that learned Bishop seems to invert the Method of Proceedings in such Assemblies, where Men usually vote first and subscribe afterwards; and this *Latin* Edition has the misfortune to differ from that Manuscript which is admitted to be the Original, and from the other which was re-viewed about 9 Years afterwards, in a Convocation assembled in the Year 1571. and from the *English* Editions printed between that Time, which do not mention this Clause; so that the *Latin* Edition stands singly in this Matter, it being printed in no other Book till the Year 1593.

Besides, 'tis very uncertain arguing from Records which do not appear; and it would still remain a Difficulty if they did appear, because even then, tho' they had this Clause, they could not be of equal Authority with the Originals signed by both Houses of Convocation.

But that there were no such Records before the Fire, this Passage was produced, (*viz.*) one Dr. *Mockett*, Chaplain to Archbishop *Abbot*, who was Archbishop *Laud's* immediate Predecessor, wrote a Book, entituled, *Politia Ecclesiae Anglicanae*, which was publicly burnt; and the reason assigned was, that it favoured of *Calvinism*, &c. But Dr. *Heylin* tells us, the true reason was because, in Publishing *this Article*, he had left out this *Clause*; now if that had been really a Fault, and could have been proved so at that Time by any of these Records, it would certainly have been alledged as a reason for burning that Book.

Those

Those who stretch this Authority tells us, that 'tis a Power vested in the Governors of the Church to determine what shall be received and professed for Truth among the Members of the Church, and to bind them to Submission to their Sentence, tho' 'tis Erroneous; and this was the Opinion of Bishop *Sparrow*, in his Preface to the Collection of our Canons, &c.

But my Lord of *Sarum* doth not seem of the same Opinion, for he distinguishes between an Authority which is absolute, and grounded upon an Infallibility, which is disclaimed by our Church, and an *Authority of Order*, for maintaining Unity amongst us; for where Differences have been examined by the Majority of our Governors, and settled upon mature Deliberation, they may require all the Clergy to declare their Assent to such Determinations; and this he calls an Authority of *Order*, to preserve and maintain Peace and Union in the Church. That great Respect is likewise to be given by all the Laity to such Determinations; but yet that learned Prelate allows, that if a Man cannot bring his Reason to comply with such Decisions, his Conscience is not bound by them, because the Authority by which they were established was not grounded upon any Infallibility.

But to return; the legal Subscription to these Articles is enjoined by the (a) Statute, which establishes them, and requires every Clergyman to declare his Assent, and *subscribe* them in the *Presence of his Ordinary*.

This being done, he must bring a Testimonial, or Certificate, from the Bishop, of such his Assent or Subscription, and must publicly *read* the Articles in the Church where he is to serve, and declare his unfeigned Assent to the same: And this he must do within *two Months* after his Induction, accounting 28 days to the Month; or else he is, (b) *ipso facto*, deprived, and a general Pardon will not restore him.

And this Subscription must be considered as a Declaration of the Opinion of the Subscriber; and therefore if he declare, that he Subscribes and Assents to the (c) Articles so far forth as they are agreeable to the Word of God, 'tis not good.

'Tis true, the Form of the Subscription is not set down in the Statute; but by the (d) Canon 'tis expressly required, that he subscribe and allow the Book of Articles, and that he acknowledge them, and every one of them, to be agreeable to the Word of God.

It hath lately been a Question, Whether a Clergyman shall forfeit his Living, if he doth not subscribe to *all the Articles*? Because the Statute requires, that he shall subscribe *such only which concern the Confession of the true Christian Faith*.

(a) 13 Eliz. cap. 12. (b) Cro. Eliz. 690. 2 Lev. 101. (c) Cro. Eliz. 252. Noy 150. 6 Rep. 20. (d) Canon 36.

But upon reading the Statute, it seems plain that those Words respect only those Ministers who were then living, and who pretended to be Priests by any other Form of Institution, Consecration, or Ordering, than the Form set forth by the Parliament, in the Reign of Edward VI. which are the very Words of the Statute; and this was because the Churches, at that Time, might be filled with Men of sound Religion, and to indulge such Clergymen, tho' they might be scrupulous of some Ceremonies then in use.

There is another Clause in the Statute which relates to those Articles concerning the Confession of Faith, (*viz.*) *If a beneficed Minister shall maintain any Doctrine repugnant to the said Articles, and being convicted before the Ordinary, shall persist therein; or if after he revoke his Error, shall affirm the same again, it shall be lawful for the Bishop to deprive him; and this Clause respects as well the Clergy who were then living, as their Successors.*

But by the next Paragraph, every Minister hereafter, to be admitted into any Living, is enjoined, not only to subscribe, but to read the said Articles; which can never be intended of those only which concern the Confession of Faith, but all the Articles agreed on by the Archbishops and Bishops, &c. And this is agreeable to the Canon which was made about 33 Years after the Statute, by which every Clergyman is to acknowledge all and every the Articles to be agreeable to the Word of God; and since, by the Canon, he is to acknowledge All the Articles, &c. it seems reasonable to Expound the Statute, that he should subscribe to all.

Those who dissent from our Church cannot subscribe to the 3d Article, as agreeable to the Word of God, (*viz.*) *As Christ died for us, and was buried, so also it is to be believed that he went down into Hell;* for they cannot believe the Local Descent of Christ into Hell, which those Words seem to import, because none of the Evangelists mention it: And they say, that 'tis improbable so remarkable a Transaction should be omitted by them, and by the Fathers who lived in their Days, and immediately after them.

But the afore said Bishop of Sarum tells us, that the Words (*He went into Hell*) will admit of three different Constructions, both in the Letter, and in Grammar.

(1.) The Local Descent, and that is implied by the word *Hell*.

(2.) The Grave, according to the Signification of that word in *Hebrew*.

(3.) The place of Spirits, separated from their Bodies, according to the *Greek* word.

So that a Man may subscribe to this Article, if he apprehends it in either of these Senses.

But as to Subscriptions required by the Clergy, Sir Symon Degg advises them to have some credible Witnesses present when they subscribe before the Bishop; and that those Witnesses do attest

attest the Bishop's Certificate of such Subscriptions, and that they get two Books of those Articles, and give one to a Parishioner to read with them, and then to attest the Books after this Manner:

¶ I R. B. was present on such a Day in the Parish-Church of H. in the County of S. and heard J. S. then and there read the said Thirty nine Articles during the time of Divine Service, and declare his unfeigned Assent and Consent to all the Matters therein contain'd; and he advises the Clergyman to keep the Articles thus subscrib'd by the Parishioner.

But if he neglect till the two Months are expir'd, then he advises him to get the Queen's Title *Ad Corroborandum*, as he calls it, and afterwards to perfect his former Neglect.

In these Cases of Deprivation the Patron must have personal Notice from the Bishop; and the first Case which happen'd upon this Statute was to this very Purpose; and it was about five Years after it was made, which was this: One (n) *Thwaites* was presented by an Abbot in the Reign of H. 8. and was afterwards depriv'd for not reading the Articles; the Bishop of *Carlisle*, in whose Diocese the Benefice was, sent a Mandate to the Curate of that very Church to be read there, purporting that *Thwaites* had not subscrib'd the Articles, and this was read in the Church and fix'd on the Door; but yet it was not a good Notice of the Deprivation, for the Bishop ought to give personal Notice to the Patron before he could have a Title to present by Lapse.

A Parson having one (o) Benefice with Cure accepts another, to which he was inducted, but did not *subscribe* the Articles after his Induction, as requir'd by the Statute; the first Benefice is not void by the Acceptance of the second, because he was never a lawful Incumbent on it; for not subscribing the Articles made his Admission to the second Living void, and by Consequence there was no Cause for losing the first Benefice.

But if after Admission into the second (p) Living he had subscribed the Articles, then he had been perfect Incumbent, *pro tempore*, viz. for two Months, tho' he had not read them; and so, by taking the second Living, the first was void; and by not reading them within two Months after his Induction into the second Living, that was void likewise.

About six Years after *Thwaite's* (q) Case, a *Quare impedit* was brought upon the Queen's Title to present to the Rectory of *Haversham*, in the Diocese of *Lincoln*, for that *Ashton*, the last Incumbent, had not read the Articles; but because it was not said that the Church of *Haversham* was a Church * with Cure, &c. the Declaration was ill.

(n) Dyer 346. (o) Dyer 379. b. Vaugh. 132. (p) Vaugh. 133. Hob. 167. (q) 1 And. 62. * 2 Lut. 1089.

If the Key of the Church cannot be had, 'tis sufficient to read the (r) Articles in the Church-Porch, in the time of Divine Service.

The Proof in this (f) Case may be of a Negative, which is not usual in other Cases; for if a Person sue for Tythes, and the Parishioner pleads that he did not read the Thirty nine Articles; he must prove it, because the Law doth presume the Affirmative, (*viz.*) that the Parson did read them.

So in (t) Ejectionment for a Rectory, &c. 'tis sufficient if the Parson proves his Admission, Institution and Induction, without Proof that he read the Articles.

Audience.

IN former Days the Archbishop of Canterbury did hear Spiritual Causes in his Palace, for which Purpose he had a Court there call'd a Court of Audience.

But before he came to any Determination he advis'd with Persons learned in the Civil and Canon Laws, who from thence were called his Auditors.

Afterwards one Person was thought to be sufficient in this Matter, and he obtained the Name of *Auditor audientia Cantuariensis*, and the Court was called *Cura Audientie*.

This *Auditor* deriv'd his Authority from the Archbishop, and his Jurisdiction was equal to that of the Dean of the Arches, tho' he was inferior to him both in Dignity and Antiquity; for by a special Commission he is made Vicar-General to the Archbishop; and by Virtue thereof he hath all Spiritual Jurisdiction in any Diocess within his Province, *Sede vacante*; and this he might execute, either by himself or his Commissary, and might cite any Person out of such Diocess without Danger of the Statute 23 H. 8, because the Archbishop in such Case is Ordinary of that Diocess.

But generally, Matters only (u) *Pro forma* were transacted in this Court by the Archbishop himself; as concerning Confirmations, Elections, and Consecrations of Bishops, and Matters of voluntary Jurisdiction, and *Ex officio*, as granting the Guardianship of Spiritualities, Admissions and Institutions to Benefices, *Sede vacante*, and dispensing with Bans of Marriage; but now this Court is not so much in Use as formerly.

Avoidance.

THIS, as 'tis oppos'd to Plenarty, is where there is a Want of a lawful Incumbent on a Benefice; during which Vacancy the Church is *Quasi viduata*, and the Possessions belonging to it are in *Abeance*.

(r) 1 Lev. 101. (f) 1 Rol. Rep. 83. (t) Sid. 220. (u) 4 Inf. The

The Causes of Avoidance are more by the Canon Law than they are by the Common Law ; and tho' those Laws agree in many such Causes, yet they differ in some, as for Instance ; If a Layman is presented to a Church, 'tis void by the Canon Law ; but the Capacity of the Person is not so much consider'd by the Common Law, as his Institution and Induction ; for by those Acts the Church is full, and shall not be void, but from the Time of the Deprivation of the Incumbent, for his Incapacity.

Avoidances are either in Fact or Law : The first and most natural is by Death of the Party, and in such Case the Patron must take Notice of the Avoidance, so as to present within the six Months.

Then there is an Avoidance by *Cession, Plurality, Deprivation, Incapacity, Union, Symony, &c.* these are Avoidances in Law, and of such no Title accrues to the Patron.

There are also Avoidances by the (x) Act of the Party, as by Resignation ; and there the Ordinary must give Notice to the Patron before he can have a Title to present by Lapse.

(1.) There are likewise Avoidances by Act of Parliament ; as if Tenths due to the Queen are demanded at the House or Church of a (y) Clergyman, by such who are charged to collect them, and not paid in forty Days, then upon the Bishop's Certificate thereof into the *Exchequer*, the Person is, *ipso facto*, depriv'd.

(2.) If a beneficed Person is convicted in maintaining any foreign (z) Power by his Preaching.

(3.) He, who maintains a Doctrine contrary to the Thirty nine (a) Articles, and, being summon'd before the Ordinary, doth persist in it, may be depriv'd by him.

(4.) So an Officer taking (b) Money, or any Reward for admitting, instituting, or inducting, &c. loses two Years Profits of the Benefice, according to the true Value, and the Benefice shall *est-foon* be void.

(5.) So if any Clergyman, who shall be presented by either (c) University to a Living in the Gift of a Papist, shall absent himself six Days, the Benefice shall be void.

(6) So a Clergyman omitting to take the (d) Abjuration-Oath within three Months after Entry on a Benefice, 'tis void.

These Statutes are differently penned as to the Avoidance ; for some are, that the Clerk shall be depriv'd ; that he shall lose his spiritual Promotion ; that his Benefice shall be void ; that it shall *est-foon* be void, and that he shall be, *ipso facto*, depriv'd.

Now in all these Cases but the last, there must be a Sentence judicially pronounc'd to make the Living void ; and the Cano-

(x) Dyer 327. (y) 26 H. 8. (z) 1 Eliz. cap. 1. (a) 13 Eliz. cap. 12. (b) 31 Eliz. cap. 6. (c) 1 Will. cap. 26. (d) 13 W. 3. cap. 6.

nists affirm it must be so in the last Case, unless the Legislators Minds do more fully appear, as by those Words; That the Benefice shall be void, so that it shall be lawful to present another; and they say, that where the Words are, A Man shall be, *ipso facto*, depriv'd, he only loses the Title which he had to the Benefice, but may keep the Possession till Sentence of Deprivation.

'Tis true, there hath been a Resolution in a Court of Common Law, agreeable to the Opinion of the Canonists in the first of these Cases, and it was upon the Statute 21 H. 8. cap. 13. which enacts, that if a Man takes two Livings incompatible, and is inducted into the second, the first shall be void, and the Patron shall present another, as if the Incumbent had been dead; This is an Avoidance without a Declaratory (e) Sentence of Deprivation; and so 'tis in our Law, where the Words are, that the Party shall be, (f) *ipso facto*, depriv'd; tho' the Canonists are of another Opinion.

So in the 2d Resolution in * Green's Case, upon the Statute 13 Eliz. for not reading the 39 Articles, by which 'tis enacted, that the Parson shall be, *ipso facto*, depriv'd; in such Case my Lord Coke tells us there needs no Declaratory Sentence,

The different penning of Acts of Parliament of this Nature is farther to be observ'd in the Cases following; Where an Act declares the Admission, Institution, and Induction to be void; as it doth where a Man is made a (g) Priest under Twenty three Years of Age, there 'tis void without a Sentence of Deprivation.

But if a (b) Statute makes a Man incapable of a Benefice, under the Penalty of a pecuniary Forfeiture: As for Instance, That no Person shall be capable of any Ecclesiastical Promotion, before he is ordain'd Priest, under the Penalty of 100 l. that doth not make the Admission void, and by Consequence there is no Occasion of any Sentence.

Lastly, 'Tis to be observ'd, that in Cases of Avoidance, by Act of Parliament, the Bishop shall not collate by Lapse, but from the time of Notice given to the Patron, unless 'tis specially provided by the Act to the contrary.

The next thing to be consider'd is, who shall have the Profits during an Avoidance; and as to that Matter, it hath been held, that the House and Glebe are in *abeyance*; and formerly it was held, that if the Incumbent had liv'd till Lady Day, he might dispose the Tythes of the Summer following by his Will.

But now by the Statute 28 H. 1. cap. 11. the Profits arising during the Avoidance are given to the next Incumbent, towards Payment of the First-Fruits; and the Ordinary who hin-

(e) Moor 542. (f) Deg. 56. * 6 Rep. 29. (g) 13 Eliz. cap. 12. (b) 14 Car. 2. cap. 4.

ers him forfeits treble Damages, to be recover'd by ; but such Ordinary may receive the Profits to provide for the Service of the Church, and shall be allow'd for the Charges of supplying the Cure, and carrying in the Tythes ; and for this Purpose the Churchwardens are usually appointed under the Seal of the Court.

By the same Statute the Successor is to have the Parsonage-House, and such Glebe as is not sown, and this he must have within a Month after Warning ; but if the Glebe is sow'd, then the Incumbent must dispose it by his Will, out of which Tythes must be paid to the Successor.

So likewise if the Avoidance is by Deprivation or Resignation, the Successor shall have the Tythes of the Glebe sown.

As the Advowson it self may pass by Deed, so may the next Avoidance, but this must be where the Church is full ; for where there is no Incumbent the void Turn is not grantable, because 'tis a meer spiritual Thing ; and during the Vacancy 'tis only a Thing in Action ; 'tis a Power or Authority of Nomination vested in the Person of the Patron, and not the Advowson it self.

'Tis true, the (i) Queen by her Prerogative may grant a thing in Action, but not in this Case ; therefore where She is seiz'd of a Mannor, to which an Advowson is appendent, and the Church being void, She grants the Mannor with the Advowson ; the void Turn doth not pass to the Grantee, because it was a Chattel vested in the Queen ; but if the Advowson had been in gross, and not appendent, 'tis otherwise.

A Grant of the next Avoidance is no more than a Chattel ; for if 'tis granted to a Man, his Heirs and Assigns, it shall go to his Executors. But tho' 'tis only a Chattel, it will not pass by the Words *Bona & catalla*, because those general Words comprehend such things which a Man hath in Possession, but *Jus presentandi* is a future Right.

But if the (k) Grant is to a Man and his Assigns for his Life, and that it shall be lawful for him during his Life to present to the Church where it shall happen to be void, this is a limited Grant ; so that if there is no Avoidance during his Life, his Executors shall not have it afterwards.

Justice Coke reports the same Case a little plainer ; and he tells us, that the Grantee for Life died before the Church was void, and his Executor granted the next Avoidance to another, who presented upon the Death of the last Incumbent, and the Issue was upon *Non concessit*, which was found accordingly, for the Grant was void.

There is a plain Difference between a Grant of an Avoidance, and the Grant of the next Avoidance ; for the one is a thing in actual Possession, and the other in Expectation.

(i) 2 Rol. Abr. 196. (k) Jones 407. Crp. Car. 505. 2 Rol. Abr. 49. But

But because we often meet with Grants of the next Avoidance, I shall shew,

(1.) Where such Grants are void in themselves.

(2.) Where they are made void by the Act of the Party, and where not.

(3.) Where they are made void by the Act of a Third Person, who is no Party to the Grant.

(1.) Where such Grants are void in themselves; and as to this, If Tenant in Tail of a Mannor, to which an Advowson is appendant, grants the next Avoidance, and dies before the Church becomes void; this Grant is not good, because 'tis only a (1) Grant of a Chattel, for there can be no Rent reserv'd upon such a Grant.

So if Tenant in Tail of an Advowson, and his Son and Heir join in a (m) Grant of the next Avoidance, and then the Father dies; this Grant is void as to the Son, because he had nothing in the Advowson, either in Possession or Right, at the time of the Grant.

(2.) 'Tis void by the (n) Act of the Party, as where a Man grants *Proximam advocacionem*, when it shall happen to be void, and the Church was void at that Time; this made the Grant void as to that very next Avoidance, but it shall be good for the next Turn after that.

But if he grant *Præsentationem*, without saying *Proximam, quandocumq; & quomodocumq; Ecclesia vacare contigerit, pro unica vice tantum*, and that the Grant shall be in force till a fit Clerk be admitted upon his Presentation; if he doth not present upon the next Avoidance, this Grant is void, because the Limitation being uncertain, the law will enforce the soonest Execution of it; but if these (o) Words should be construed to give him Liberty to present when he will, it will be void for that very Reason, because the Grantee could not then be barred, either by Lapse or Usurpation, which is contrary to the Nature of an Advowson.

So if I grant (p) *Proximam advocacionem* to Two, and afterwards the Church being void, one releases to the other all his Right, &c. this Release is void, because the next Avoidance was attach'd at that very Time; for the Title was in both, and one could not then release to the other.

But if the next (q) Avoidance is granted to Two, and one releases to the other, in the Life-time of the Incumbent, he, to whom the Release is made, may bring a *Quare impedit* in his own Name; because, during the Life-time of the Incumbent, the next Avoidance was only a thing in Interest, and might be

(1) 1 Rol. Rep. 190. 1 Bulst. 31. (m) Hob. 45. (n) 1 And. 15. Dyer 130. Moor. 249. (o) 1 Bulst. 26. (p) And. 223. Owen 85. Cro. Eliz. 173. 1 Leon. 167. (q) Moor 467. Cro. Eliz. 600.

releas'd, for it was not a thing in Action till the Church was actually void.

If (r) Lessee for Years of an Advowson grants the next Avoidance which shall happen during the Term, and then dies intestate, and his Administrator surrendered the Term to the Lessor, then the Church becomes void; the Grantee shall present, notwithstanding the surrender of the Term, for it shall be intended to continue for his Benefit.

(3.) A Grant of the next Avoidance may be void by the Act of a third Party, who is a Stranger to the Grant.

As where the King makes a Parson a Bishop; in such Case he is to present by Virtue of his Prerogative, so that the Grantee of the next Avoidance cannot have the next Turn.

Therefore where a Man gave (f) Bond, condition'd to procure a Grant of the next Avoidance of an Archdeaconry for the Obligee, so that he might present, and the Archdeacon was made a Bishop before the next Avoidance; by this Means the Bond is forfeited, because the King had a Title, by Virtue of his Prerogative to present to the next Turn.

B A N S ; See Marriage.

Baptism.

THIS is a Federal Admission of Persons into Christianity, in which all the Blessings of the Gospel are made over on God's Part to the Baptiz'd; and those who are admitted to Baptism are by solemn Vows oblig'd to observe the Christian Religion. Those Blessings of the Gospel are the Grace of the Holy Spirit, the Pardon of our Sins, and everlasting Life, to all which we are entitl'd by Baptism: Our Saviour himself told his Disciples, *That he who believ'd and is baptiz'd shall be sav'd*; and at another Time he told *Nicodemus*, that *Except a Man be born of Water and of the Spirit, he cannot enter into the Kingdom of God*; and *St. Peter* advis'd the converted *Jews* to *repent and be baptiz'd, that their Sins might be forgiven, and they receive the Gift of the Holy Ghost*.

And 'tis plain from the Scriptures that Baptism is an Institution by that Mission which Christ gave to his Disciples to go and preach and make Disciples, (t) *Baptizing them in the Name of the Father, &c.*

So that they were first to be made Disciples, that is, they must be first convinc'd that Christ is the *Messias*, and sent of God to be the Saviour of the World; and when they stedfastly believ'd this Doctrine, then they were to be baptiz'd, in order

(r) 8 Rep. 145. (f) 3 Leon. 151. 4 Leon. 61. Golds 41.
(t) Mat. xxviii. 19.

to be initiated in Christianity, and oblig'd to renounce Heathenism.

By the Mosaical Dispensation, Circumcision was a Fæderal Admission to the *Jewish* Religion, and, that being taken away, Baptism was instituted in its stead; which tho' in Circumstances not agreeable to Circumcision, yet both are alike in this Respect, (*viz.*) that both were the respective Rites of Admission into the several Covenants; and thereby the Covenantees became intitl'd to the respective Privileges which were annex'd to them, and in both Cases they were oblig'd to observe the whole Law to which they were respectively initiated.

And tho' Baptism was not us'd among the *Jews*, yet they had a Notion of it (as we are told by learn'd Men) and of the manner of performing it; for when St. *John* baptiz'd others, and they would know who he was, he told them he was not the *Messias*, nor *Elias*, &c. They immediately replied, *Why dost thou then baptize?* From which Words 'tis natural to infer, that if he had been either of those Persons, he might have baptiz'd; and it was usual amongst them, when an Heathen was converted to Judaism, to wash the Convert, which was an Emblem of Purification from his former Idolatry, and Entry into Religion.

As to the Persons by whom this Sacrament was administer'd, we have been told by a learned * Doctor, *That Baptizing was accounted an inferior Ministry, and as such not perform'd by our Saviour, but by his Disciples; that the Apostles themselves did not baptize, but deputed some of their Attendants to do it: Thus Cornelius and his Family were baptiz'd, not by St. Peter, by whom they were converted; but by some of the six Brethren who accompanied him.*

Then as to the Persons baptiz'd by Christ; they were first led to the Water, and laid naked therein, as a Man is laid in his Grave, and without any Garments, but only such which might cover the natural Secrets, and then these Words were spoke, *I baptize thee, &c.*

And from this Example, Baptism, in the Primitive Times, was usually in Rivers and Fountains, which might be convenient enough in the Eastern Countries, because the Converts were not only many, but Men of Years.

Those who were sick could not be baptiz'd after this manner, but it was done by sprinkling them in their Beds, and from thence they were call'd *Clinicks*; but those who were in health were brought to Ponds, or Rivers, for the first 200 Years after Christ, and turning their Faces towards the West (which a † learned Divine of our Church tells us, was a Symbolical Representation of the Prince of Darkness) they were commanded to spit, and to renounce the Service of their old Master the Devil, and were then ask'd by the Bishop these Questions: *Dost*

* Potter of Ch. Go. 72. † Reeves 105.

thou renounce the Devil and all his Works? the Answer was, *I do renounce them.* The next Question was, *Dost thou renounce the World and all its Poms and Vanities?* The Answer, *I do renounce them.* Then follows a Confession of his Faith, *Dost thou believe in God?* The Answer, *I do believe in him.* To which the Office of Baptism in our Church exactly agrees.

Afterwards they were dip'd three Times in the Water, which was call'd the *Trine Immersion*, that being an Expressive Ceremony of the Three Persons in the Godhead; And because the *Arians* objected against the *Catholicks*, that this Ceremony was us'd by them to signify three Distinct Substances in the Trinity, it was therefore laid aside.

With us here in (*u*) *England* we have an Account, that when the *Saxons* were first converted to Christianity, many were baptized in the River *Swale*; and our Histories mention, that *Paulinus* the first Archbishop of *York*, when he converted the North Part of *England* to Christianity, baptiz'd several in the Rivers *Darwent* and *Humber*.

When the Custom of baptizing in Rivers and Fountains was discontinu'd, the People made little Vessels in their Houses to hold the Baptismal Water, and from thence they were called *Fonts*.

Afterwards, when the (*x*) Christians were persecuted they baptiz'd People in Woods; and when the Persecution ceas'd they came nearer to the Churches, and plac'd their Fonts at a little Distance; then they got Leave to set them in the Church-Porch, and so by degrees placed them in the Churches, but not in every Church, for at first they were only in Cathedrals; and tho' the Service might be performed in the Country Churches, yet Baptism and Burials were only in the great Churches, unless in Cases of Necessity.

When these *Fonts* first got into the Churches they were placed at the Entrance, and the People went down a few Steps to them; and they were so large, that those who were baptized were dipped in the Water; but when Immersion was no longer us'd, Fonts were still kept up in the Churches, tho' not so large as before: And this shews that Baptism was anciently to be celebrated not only in the Churches, but in the most publick Place thereof (*viz.*) at the very Entrance into them; and this may be the Reason why 'tis enjoined by the (*y*) Canon to be administred in Churches, and not in private Houses, unless in Cases of Necessity; as where the Child is sick.

The learned Bishop of *Worcester* tells us, that, whilst the ancient Discipline was kept up, Baptism could not be administred privately, because it was never celebrated but in the great Festivals of the Year, that is, at *Easter* and *Whitsuntide*; tho' not always on those Days precisely, but at any Time between those

(*u*) Bede lib. 2. cap. 34. (*x*) Ridly's View, &c. 238. (*y*) Canon 71.

two Feasts; but this must be understood of Persons converted to Christianity by Preaching, and not of Infants: For such, who came to be baptiz'd, were to be examin'd in the Face of the Church, and catechised all the forty Days of Lent; but when whole Nations were converted, and Infants were baptized, the most regular and solemn Method was to baptize them in Churches.

Now as to the baptizing Infants, I agree there is no positive Rule for it in the Scripture; yet since Christ conform'd his Institutions in some Measure agreeable to the Laws of the *Jews*, 'tis reasonable to believe, that, where he gave no express Command to the contrary, something like their Dispensation should continue.

But tho' there is no positive Rule, yet there may be probable Proofs, deduc'd from the Scripture, for *Infant-Baptism*: As for Instance, our Saviour commanded his Disciples to * go and disciple all Nations, baptizing them in the Name of the Father, and of the Son, and of the Holy Ghost. Now 'tis plain from those Words that the Discipling was by Baptism; the same Word was us'd by *Justin Martyr*, who lived about 150 Years after the Birth of our Saviour; who tells us in his Apology, that he could produce abundance of both Sexes, who have from their Childhood been discipl'd into Christ; and a † reverend Divine, who hath lately commented upon this Passage, is of Opinion, that a Person of *Justin's* Learning and Curiosity must necessarily know such a plain Matter of Fact as Baptism was, both before and at the Time he liv'd, and that it must be of Infants before they were capable of learning the Christian Doctrine by Instruction; for what else could he mean by being discipl'd from their Childhood, especially since in the same Page those Children are oppos'd to Men, who had been converted and baptiz'd upon a due Consideration of the Principles of the Christian Religion.

But to return: In all Ages Parents had a Natural Power and Authority over their Children, therefore they are intrusted by the Laws of Nations to look after their civil Rights; and 'tis for this Reason that all Contracts, which they make in the Behalf of their Children, being Infants, and which are for their Advantage, shall not be avoided by them when of full Age; and if they have such a Right in temporal Affairs, 'tis highly reasonable that they may dedicate their Infant-Children to God; and the rather, because in the New Dispensation nothing is said against baptizing Infants, therefore it may seem reasonable that both Dispensations should agree in this, (*viz.*) that as Infants were circumcised formerly, so they may be baptized now.

* Mat. 28. 19. † *Rever* Vol. I, 39.

The first Debate about this Matter was in the Beginning of the Reformation, for *Anno 3. Ed. 6.* several *Germans* came hither, who held that Infants ought not to be baptiz'd, because they were not capable of Instruction; and this Opinion they grounded upon the first Institution of Baptism beforemention'd; which was, that the Disciples should preach and then baptize the People.

These were call'd the *Moderate Anabaptists*; but there were more of that Sect, who denied all the Principles of the Christian Religion; and these were Men of fierce and rebellious Tempers; they had rebelled in *Germany*, and rais'd that War which was call'd there the *Rustick War*; they took *Munster*, and made *John of Leyden* their King, whom they call'd the King of the *New Jerusalem*.

Those who first propagated this Sect were *Mark Stribner*, who had both Wit and Learning; *Nicholas Stork*, who had neither; for he was an illiterate Person, but pretended to Inspiration; and *Thomas Munzer*, who was a very bold and passionate Man: They despis'd the Authority of the Church of *Rome*, and held, that Princes had no Power but by Usurpation, because every Christian, as such, was subject to Nobody; they got many Followers by a pretended Sanctity and rigid Morality; by quoting Scripture at random, which made silly People believe them to be great Men; and by dying with great Constancy for their Opinions.

And the better to unite themselves, they re-baptiz'd those of their Party, and declar'd the Baptism of Infants to be void, for which Reason they were call'd *Anabaptists*.

They agreed with *Luther*, that Christianity ought to be re-form'd according to the Word of God; and tho' he disagreed with them in their seditious Conduct and Behaviour, yet their Miscarriages were imputed to him, which rais'd such a Scandal on the Reformation, that it put some Stop to its Progress.

This made *Luther* and *Melancthon* write with great Zeal against them and their Opinion; *Zuinglius* confuted them in a Publick Disputation at *Zurich*, and *Oecolampadius* did the like at *Basil*; but they were not to be reclaim'd by Arguments, nor scarce by those Capital Punishments which were inflicted on some of the Ringleaders.

Soon after they landed in *England*, a Commission was directed to Archbishop *Cranmer*, and others, to enquire into their Conversation, and to endeavour either to reclaim, or to excommunicate and commit them.

Amongst these *Joan Bocher*, commonly call'd *Joan of Kent*, was one, who held that Christ was not incarnate of the Virgin, because her Flesh was sinful, and therefore he could not partake of it.

The Archbishop, and the rest of the Commissioners, could not prevail with her to renounce this Error; therefore she was adjudg'd.

adjudg'd an Heretick, and deliver'd over to the secular Power for Punishment.

The King sign'd a Warrant for her Execution by Burning; but with Tears in his Eyes, telling the Archbishop (who persuaded him to it) that, if he did wrong, he must answer it to God; the Woman was burnt, and no Part of that Archbishop's Life expos'd him more than this did.

But to return from this Digression; There is now a Form of Baptism enjoined by the Law, which must be observ'd, and the Minister cannot refuse, or delay to baptize a Child according to that Form; being brought to the Church, either on a (r) Sunday or Holy-day; if he doth, the Bishop may suspend him for three Months.

But if the * Child is in danger of Death, and the Minister refuseth to go to the House, being desir'd, and the Child dieth unbaptiz'd, he shall be suspended in like manner, and shall not be restor'd till he hath acknowledg'd his Fault before the Bishop, and promis'd to do so no more; but where there is a Curate this Punishment shall not extend to the Parson.

Now since Baptism is made a necessary Means to Salvation, a Suspension for three Months seems to be a very slender Punishment for a Minister, where a Child dies unbaptiz'd thro' his Negligence or Omission.

By the (a) Canon, a Parent is not to be admitted Godfather to his Child, nor any other Person, before he hath receiv'd the Sacrament: We have not many Instances of Prosecutions, either for Neglects of this Nature, or for baptizing in any other Form than what is enjoined by Law; some we have, As for Instance,

A Man was convicted for baptizing a Child in another Form, and was indicted a second Time for the like Offence, and had Judgment to suffer Imprisonment for a Year, and to be, *Ipso facto*, depriv'd of all his spiritual Promotion; and upon a Writ of Error brought, this (b) Judgment was reversed, because the first Conviction was not set forth in the Indictment.

And as Ministers have been prosecuted for baptizing in a different Form than what is requir'd by Law, so they have prosecuted their Parishioners for a Fee due to them upon baptizing in the regular Way; but I cannot find that there is any thing due for it, by Virtue of any Custom or otherwise; and therefore when the Curate of (c) *Bridlington* in *Yorkshire* libell'd against his Parishioner for a Shilling, as due to him for baptizing his Child, a Prohibition was granted.

By the ancient Canons it was Symony to take any thing for Sacraments, because they ought to be administred freely; but the Canonists themselves taught the Clergy to evade their own Laws; for they told them, that though they ought not to take

(r) Can. 68. * Idem. (a) Canon 29. (b) Godb. 118.
(c) 2 Lut. 1030.

any thing for Baptism, yet they might sell the Water to the Parents before it was consecrated.

This is one of the worst of their Evasions, for Water is an Element free and in common to all Mankind for their necessary Use and Conveniency.

So that a Minister ought not in any case to be paid for Baptism, 'tis his Duty to baptize in the Church; but if the *Child* is in danger of Death, he is obliged to go to the House, &c. but if he Baptises in a private House where the *Child* is likely to live, and he is paid for his Journey thither, 'tis as bad as being paid for the Water, because 'tis contrary to his Duty to administer Baptism in such Cases,

Bastardy.

CAUSES concerning *Marriage* were at first tried in the Temporal Courts; but afterwards, by the Concession of Princes, such Causes were determined in the Spiritual Courts: And for that reason it was thought necessary, that the Violation of *Marriage* should be determined there; and as to this Matter they distinguish between

GENERAL }
and } *Bastardy.*
SPECIAL }

Where a *Sute* is commenced in a Temporal Court for an Inheritance, and the Defendant pleads in Disability, that the Plaintiff is a Bastard, this must be tried in the Spiritual Court, and this is called *General Bastardy*; for the Issue must be joined upon it, and transmitted by the Queen's Writ to the Bishop, who is to Try it in his Consistory Court, not according to the Canons, but pursuant to the Rules of the Common Law; for these Laws differ in this matter, viz. by the Canons he is no Bastard who is born before Marriage, if the Parents afterwards Intermarry; but 'tis otherwise by the Common Law, for such a Child is a Bastard.

When the Matter is tried by the Bishop, he is to certify it under his Seal to the Queen's Justices; which Certificate is conclusive to them, for they are to give Judgment as 'tis found there.

But where the principal Matter of the (*a*) *Sute* is concerning Bastardy it self; as if an Action of Slander is brought for calling the Plaintiff *Bastard*, and the Defendant justifies that he is a Bastard, it shall be tried by the Country; and that is called *Special Bastardy*.

As for the Derivation of the Word, we have it from the *Germans*, who more properly write it *Bastart*; for *Bas* signifies in that, and other Languages, (mean) and (*Start*) in the *Saxon*

Tongue, signifies *risen*; so that the Words import, *meanly risen, or base born.*

But it was not always a Name of Reproach, for it was formerly a Term of Honour in some Places; and the learned (b) *Glossographer* tells us, That in some Northern Countries they admitted Bastards into Succession; and that might be the reason why our first King *William* took upon him that Name, for he began his Letter to *Alan*, Earl of *Breteigne*, in this manner: *Ego Willielmus cognomento Bastardus.*

In our Law he is thus defined, (*viz.*) one who is born *ex illicito concubitu*; as for instance, if a Man hath (c) Issue by a Woman, tho' he afterwards marry her; so if he hath Issue by a second Wife, when the first is living; or if he hath Issue upon Marriage, within the prohibited Degrees, but not till a Divorce, for the Marriage is not void, but voidable.

Both by the Civil and Canon Law, a Child born before Marriage might inherit, if the Marriage followed; and this was attempted, (d) *Anno 20 H. 3.* to be made the Law of England; the Bishops all concurred, because it was the (e) Law of the Church, but the Temporal Lords would not admit it; for 'tis against a Rule in Law, (*viz.*) *Qui ex damnato coitu nascuntur inter liberos non computantur*; which is true as to the Inheritance, but 'tis not so as to making a Marriage good, where it was between a Man and his own Sister's Bastard.

The Text in (f) *Leviticus* is, (*viz.*) *None shall approach to any that is near a Kin*: Now tho' the Sister was not married; yet no Man will say that her Daughter is not as near of Blood to her Uncle as if her Mother had been married. (g) *Mr. Selden* tells us the *Jews* themselves understood it so, and both the Canonists and Civilians interpret it in the same Sense.

'Tis generally held, that *pater est quem nuptia demonstrant*; and therefore in our Law, those, who are begotten before, and born after, Marriage, are not (h) Bastards, unless 'tis apparent that they cannot be the Issue of that Marriage, as if the Husband is beyond Sea for two Years before the Birth; or if he is but 14 Years of Age, or under; or if he is sick in Bed at the Time of the Marriage, and so continues, and the Wife is delivered in a quarter of a Year afterwards.

But if, by any Possibility, it may be the Child of the Husband, then, tho' born after Marriage, the Child, by our Law, is called *Mulier*;

As if the Wife live in Adultery, and hath Issue by another Man; yet if, by Possibility, the Husband had access to her, it shall be presumed his Child.

(b) *Spelm. in verbo.* (c) 1 *Rol. Abr.* 357. (d) *H. 3. cap. 9.* (e) 2 *Inlt.* 97. (f) *Cap. 13. ver. 6.* (g) 1 *Rol.* 359. (h) *De Jure Natur. &c. Fol.* 591.

So if the Child is born but three Days after the Marriage, 'tis Legitimate.

By the Civil Law there are Five sorts of Bastards.

1. Those who are born in Fornication, between single Persons, without any subsequent Marriage; and those are called *Filii Naturales*.

Mr. *Cambden*, in the Life of Queen *Elizabeth*; tells us, That the People made several Jest on these Words being in the Statute which prohibited any Person, during her Life, to assert who is, or should be her Heir or Successor; (except her *Natural Issue*;) which Words he tells us were put in that Act, by the Power of the Earl of *Leicester*, that he might impose a Bastard of his own upon the *English*, instead of the Queen's *Natural Issue*.

2. *Spurii*; those are Bastards, whose Fathers never intended to keep the Women as Concubines, but to leave them for others; and therefore the Father cannot be known but by Confession of the Mother.

3. *Manser*; and that is a Bastard born of a common Strumpet.

4. *Nothus*; he who is begotten of a married Woman, and who is called *Nothus*, because the Marriage shews who he is.

5. Those who are begotten between Persons prohibited to marry, either by reason of Consanguinity or Affinity.

But the common Lawyers only take Notice of three of those Bastards, which they comprehend by these Verses.

*Manseribus Scortum, Notho Machus dedit ortum,
Ut seges a spica sic Spurius est ab Amica.*

By the Canon Law a Bastard is prohibited from taking Orders, and is made incapable of any Ecclesiastical Benefice, for the Reasons following:

1. Because the Dignity of the Sacraments ought not to be committed to infamous Persons.

2. Because Children inherit the Vices of their Parents; therefore Bastards are to have no Spiritual Promotion in Detestation of their Parents Crimes.

But the Pope usually dispensed with these Canons; yet when one *Morgan*, the Natural Son of *H. 2.* begotten by him, on the Wife of Sir *Ralph Blewett*, was elected Bishop of *Durham*, the Pope would not grant him a Dispensation, unless he would acknowledge himself to be the Son of *Blewett*; which he refused, and by consequence had not the Bishoprick; for being a Bastard he was incapable of it without a Dispensation.

By the Civil Law he is made incapable of all Testamentary Benefit, either from Father or Mother; but by a Canon Law he may take, by a Devise, any reasonable Competency for his Maintenance.

But both by the Common Law and Statute, he is allowed a Maintenance; for by the one, any Man is permitted to give his Bastard Lands or Tenements by his Will; and the other

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hath provided for his convenient (i) Maintenance and Relief, by the Parents; and yet he is of no Consideration in the Common Law, for he is not accounted of the Blood, so as to raise Use; and therefore Natural (k) Affection is not a sufficient Consideration in such a Case.

He is not comprehended by the Name of Children in the Statute of Wills; he can have no Heir but of his very Body, and if he died without such Heir his Lands shall escheat; and yet in some Cases a Bastard may gain the Right of Inheritance against a Lawful Son; as if a Man, who is seized in Fee, hath an eldest Son, who is a Bastard, and the youngest legitimate, by one and the same Woman; then the Father dies, and the Bastard enters and hath Issue, and dieth without being disturbed in his Lifetime by him who was legitimate, he can never afterwards recover the Land, nor any collateral Heir, in case there had been no such Son, because the Rule is, (l) *Quod non est justum aliquem post mortem facere Bastardum, qui toto tempore vita pro legitimo habebatur.*

But there are several Acts by which the legitimate Son may interrupt the Possession of the Bastard, as if he enter, or take any manner of Profits, by putting in his Cattle into the Ground, or otherwise, tho' no express Words of Entry are used.

I shall conclude this Title with some few Observations:

1. Concerning the usual Time of the Birth of a Child.
2. Concerning Supposititious Births.

And, *First*, As to the Time of the Birth of a Child, 'tis usually *Nine Months and Ten Days* after the Conception, accounting 30 days to the Month; but 'tis Natural if born at any Time within 10 Months, or 40 Weeks; yet by Accidents, the Birth may be occasioned sooner or later, as where a Child was born 8 days after the 40 Weeks, it was held legitimate; but in this Case there were these Circumstances, *viz.* the Husband was sick but one day before he died, and the Wife was exposed to Cold and hard Usage, by her Father-in-Law, and this occasioned her Travel for six Weeks; but as soon as she was taken into a (m) House, and was supplied with Necessaries, she was delivered in 24 Hours.

The Civil Law agrees with ours in this Matter; for if a Woman is delivered in the beginning of the 11th Month, 'tis held to be legitimate, but if born at the end of it, 'tis otherwise: And we have an Account of a Widow at *Paris*, that was delivered of a Child 14 Months after the Death of her Husband; and because of the Reputation of the Woman, the Child was held legitimate, tho' it seems to be not only against Law, but against the Order of Nature.

(i) 18 Eliz. cap. 374. (k) Dyer 374. (l) 8 Rep. 101.
1 Inst. 284. (m) 1 Rol. Abr. 356. 2 Cro. 541.

Secondly, As for Suppositious Births, both the Laws of England, and the Civil Law, provide against this.

The Author of *Fleta*, who lived in the Reign of *Ed. 2.* hath a whole Chapter, *de partu supposito*, where he tells us what Remedy the right Heir had in such Case, viz. that a Writ was directed to the Sheriff, to cause the Woman who pretended herself with Child, forthwith to appear in the County-Court, there to be searched, *per discretas & legales mulieres*; and if it was doubtful to them, whether she was with Child or not, then the Sheriff might commit her to some Castle, there to continue; and that no Woman with Child come near her, *Quousque de partu suo constare possit.*

This Writ was used above 60 Years before *Fleta* wrote, viz. Anno 5 *H. 3.* when the Widow of *William Constable* of *Manton* in *Norfolk* was found guilty of this Cheat.

And in all Probability, it was of use in the *Saxon* Times; for the Form of the Writ is to command the Sheriff to summon the Woman to appear, *in pleno Comitatu tuo*; as 'tis generally known, that all Business of the Law was then transacted in that Court where the Bishop sat with the Civil Magistrate.

But afterwards, when the Courts of *Westminster* came to be established, then was the Writ *de ventre inspiciendo* framed; by which the Sheriff was commanded; that in the Presence of 12 Knights, and so many Women, *Tractari facias per ubera & ventrem*, whether the Woman was with Child or not; and if with Child, then about what Time it would be born; and that he certify the same to the Justices of Assize, or at *Westminster*, under his Seal, and under the Seals of two of the Men then present.

We have two Instances of this (n) Writ in our Books, one of a Widow, the other of a Woman who married within a Week after the Death of her Husband; the Writs in both Cases were issued out of *Chancery*, directed to the Sheriff of *London*, who certified that both were with Child; and thereupon two other Writs issued out of the *Common-Pleas*, directed to the Sheriff, to keep them safe in his Custody, and to be viewed every day by certain Women named in those Writs; so that some of them might be present at her Delivery, which was done in the Case of the Widow, but not in the Case of the married Woman; because she was to Cohabit with her Husband, and therefore the Court took his Recognizance, that she should not be removed from his House, but be viewed every day by two Women; and that those, or more, should be present at her Delivery.

The Civil Law is as careful in this Matter; for the Woman, who supposes her self to be with Child, must intimate it twice

(n) Cro. Eliz. 566. 2 Cro. 686. Winch 71. Co. Litt. 8. Reg. 227.

in every Month to those who are nearest concerned, that they may send five Women to inspect her; and she must do the like for the space of a Month, before she expects to be delivered, that they may send some Person to be there at that Time.

The Judge may appoint in what House she shall dwell; and the Room wherein she lies must be searched, and if there is more than one Door, it must be nailed up; and that three Men, and as many Women, be set to watch her as often as she comes into the Chamber, who are also to search all Persons who come into the House and Chamber.

When she is in Labour, five Women sent by the Party next concerned must be Witnesses to the Birth, of which they must have Notice before-hand; and there must be no more in the Chamber, at that Time, but ten Women, two Midwives, and six Servants, of which none must be with Child, and therefore may be searched before they go in: There must be three Lights in the Room; the Child, when born, must be shewed to those who are concerned; the Judge must appoint who shall keep it, unless the Father hath otherwise appointed; and it must be shewed twice in a Month, till 'tis three Months old; and afterwards, once in a Month, till 'tis six Months old, and once in two Months till 'tis a Year old; and from thence, once in six Months, till it can speak; and if any Thing is done, or not suffered to be done, contrary to the Premises, then, upon Proof thereof, the Child is not to be admitted to the Possession of the Estate.

Benefice.

THIS is a feudal Term, and, according to the general Acceptation of the Word, all Church-Preferments, except Bishopricks, are comprehended by it; that is, all Parochial Preferments, such as *Rectories* and *Vicarages*; and likewise all Dignities, such as *Archdeaconries*, *Deanries* and *Prebends*.

The First of these, viz. *Rectories* and *Vicarages*, are *Benefices* with *Cure of Souls*, because the Persons came in by (o) Institution and Induction, but not the other; and yet my (p) Lord Coke tells us, that they had been *Benefices* with *Cure*, &c. within the meaning of the Act against Pluralities, had it not been for a Proviso in the Act itself, to exempt them; and so had *Chancellors*, *Chanters*, *Treasurers*, in any Cathedral or Collegiate Church, and a Parsonage that hath a Vicar endowed, and a *Benefice* perpetually appropriate, all which are exempted in that Act.

But some are of Opinion, that *Archdeaconries*, *Deanries*, and *Prebends*, had not been *Benefices* with *Cure of Souls*, within the meaning of that Act, if they had not been exempted; for there

(o) Sid. 426. (p) 21 H. 8. cap. 13. 3 Inst. 71. 155.

is no such Clause of Exemption in the Statute, 13 *Eliq. cap. 12.* concerning reading the Articles of Religion; and yet if an *Archdeacon, Dean, or Prebend*, do not read them within the Time limited by Law, their Promotions are not void; and the reason is, because these are not *Benefices with Cure*: And 'tis for this reason that the Canonists call such Preferments *Simple Benefices*, because those who enjoy them have no *Cure*, &c.

As to Parochial Benefices with *Cure*, the Canon Law defines them to be a distinct Portion of Ecclesiastical Rights, set a-part from any Temporal Interest, and joined to the Spiritual Function; and to these no Jurisdiction is annexed: But 'tis otherwise as to *Archdeacons* and *Deans*, for they have a Jurisdiction, because they formerly took the Confession of the *Chapter*, and visited them.

'Tis essential to these Parochial Benefices, that they should be bestowed freely, reserving nothing to the Patron;

That it be given freely, as a Provision for the Clerk, who is only an *usu fructuary*, and hath no Inheritance in it;

That it must always have something of Spirituality annexed to it; for where 'tis given to a Layman, 'tis not properly a *Benefice*;

That in its own Nature it should be perpetual, that is, for ever annexed to the Church, and that all manner of Contracts concerning it are to be void.

Births.

BY the Statute, 6 & 7 *W. cap. 3.* all Ministers are to keep Registers of the Birth of Persons born or baptized in their Parishes; which Registers the Collectors of the Taxes may view at seasonable Times; the Clergyman offending against the Law forfeits 100 *l.*

And by the Statute, 7 & 8 *W. cap. 35.* made the very next Year, every Incumbent or Curate must Register the Births of Persons born in their Parishes, and not baptized in the Church, for which he is to take Sixpence to enter it; and if he neglects, he forfeits 40 *s.* but then the Parents of such Child must give the Minister notice of the Birth, or they forfeit 40 *s.*

Bishops.

THAT Form of Government in the Church, which is now established here, hath been preserved in some of the *Eastern* and *Western* Churches, in a continued Succession of *Bishops*, from the Apostles to this present Time, and was ordained by our Saviour himself to be a perpetual and unalterable Institution to be observed in the Christian Church; for he gave his Apostles Commission to plant Churches, which they did, and appointed *Bishops* to govern them; And this might formerly have

have been proved by the Records of those very Churches which were founded by them; as that of *Antioch*, *Jerusalem*, *Rome*, and *Smyrna*; for 'tis more than probable, that those very Records were extant in *Tertullian's* Time; otherwise, how could he, and many other ancient Writers, assert, That *Clemens*, who was the third Bishop of *Rome* from *St. Peter*, was ordained by that very Apostle? And that *Polycarp* was placed over *Smyrna* by *St. John* himself?

If this had not been certainly true, and easy to be proved at that Time, but invented by him, how came he to challenge all the *Hereticks* of that Age to shew the like Original of any of their Churches? Which they could never do; and yet they wanted neither Skill or Malice to detect him if it had been false.

St. Chrysostom, *Epiphanius*, and many others of the Fathers, tell us, that *St. Paul* ordained *Timothy* Bishop of *Ephesus*, and *Titus* Bishop of *Crete*, who were superior to *Presbyters*, both in Order and Jurisdiction.

This appeared by (9) *Ignatius*, who was Bishop of *Antioch*, and died within 10 Years after the Apostle *St. John*; for he writes in several of his Epistles, concerning *Bishops*, *Presbyters*, and *Deacons*, as distinct Orders and Degrees of Men; and in such plain and exprefs Terms, that those who are Enemies to *Episcopacy* cannot find any means to evade it; but by affirming those Epistles to be Spurious; and for no other reason but because they would have them so. But a learned * Writer hath vindicated those Epistles to be Genuine beyond all Contradiction; and hath proved, in a very plain and obvious manner, that the most considerable Writers, who lived in the Second Century, did always distinguish these Orders of Men.

I grant, that the word *Presbyter* is sometimes applied to signify a *Bishop*; but certainly, a Bishop and a *Presbyter* were never the same in Order or Office; for *Timothy* was a *Bishop*, and the Apostle bids him not rebuke an *Elder*, but intreat as a Father: Now there had been no occasion of this Admonition, if *Timothy* had not been Superior to an *Elder*, and had Jurisdiction over him: And we never read, that *Presbyters* rebuked *Bishops*, which shews they were always esteemed an Inferior Order of Men; so that when the Word was promiscuously used to signify a *Bishop* as well as an *Elder*, it was in those Times when the *Bishops* were distinguished from them by a Superior Title; as when they were called *Apostles*, or Successors of the *Apostles*, *Chief Priests*, and *Princes* of the Clergy; and that was not till the Third Century, when the Heretick *Aërius* first broached this Community of Names.

But *Epiphanius*, who lived in the same Age, and who had his Education amongst the *Ægyptian* Monks, had Learning enough

(9) Epist. ad Smyr. No. 8. 12. * Vind. Epist. Ignatij per Pearson, cap. 13. Fol. 155.

to baffle that new Opinion; infomuch that it was not revived till about the latter end of the Fourth Century; and then there were such eager Disputes about it, that the Fathers could not agree amongst themselves.

'Tis true, *St. Jerome*, who was bred up at *Rome*, but missing the Popedom, grew angry with the Order of *Bishops*; and being a Man of a fowre Temper, would have the Second Order of Priesthood be called *Bishops* as well as *Presbyters*, and in some of his Writings he makes them Inferiour to *Presbyters*; for he tells us, that at first the Churches were governed by a Community of *Presbyters*; and for a long Time, till Divisions happened in the Church of *Corinth*, when every *Presbyter* claimed those he had baptized to be of his own Flock: And he tells us, that to prevent these Divisions, there was a Decree issued forth, that one should be chosen out of the Number to preside over the Church.

Now, certainly, this was a very remarkable Decree (if ever there was any such;) and 'tis therefore very strange, that no other Writer whatsoever should take Notice of it, besides *St. Jerome*.

Sometime afterwards, *St. John Chrysostom* affirmed, that the words *Bishop* and *Presbyter* were promiscuously used to signify the same Person; and yet he tells us, that in the Time of the Apostles they were distinct, both in Order and Office.

Theodoret, who was as accurate and learned a Writer as any of that Age, agrees with *St. Jerome*, and tells us, that those whom we now call *Bishops*, were then stiled *Apostles*.

But now, admitting all this to be true, yet these minor Fathers, who so earnestly contended for the promiscuous use of the words *Presbyter* and *Bishops*, do all agree, that there was a Superiority between a *Bishop* and a meer *Presbyter*; and this was in Point of Ordination, which they all allow to be an Act peculiar to the *Bishop*.

And the difference between their Offices and Degrees, doth not only consist in the Power of Ordination, but in reconciling Penitents, in consecrating and visiting Churches, in Excommunication, &c. which were never yet trusted in the Hands of mere *Presbyters*: And those Offices which they might perform in common with the Bishop, as baptizing, administering Sacraments, were performed under different Powers; for the Bishop did it by an absolute Power, the other by a Power derived from him. For when *St. Cyprian* lived, the *Presbyters* did not presume to baptize, unless in case of Necessity; nor to Confirm after Baptism, without leave from the Bishop: They never consecrated the Elements of Bread and Wine, for that was always done by the Bishop himself, and then the Deacon distributed it to the Communicants.

'Tis true, the same Father tells us, that, a *primordio Episcopatus sui*, he would do nothing without their Advice, but he

still presided over them; and so did the *probati Seniores*, mentioned by *Tertullian*: And 'tis very plain from *St. Cyprian*, who those *Presiding Elders* were, for speaking of the Unity of the Church, he tells us it ought to be defended by all but *maxime per Episcopos qui in Ecclesia president*.

'Tis a weak Objection to affirm, that we have no Authority for *Episcopacy* in the *New Testament*; for admitting there is none, it may be for this reason, because there was a Hierarchy in the *Mosaical Dispensation*, which was not destroyed, but rather ratified by the coming of our Saviour: But 'tis certain that he speaks nothing against it, which is a tacit Approbation, that it should be continued in the Christian Church, and therefore it might not be necessary to mention it expressly in the Gospel, because it was settled among the *Jews*; and if it had not been approved by our Saviour, 'tis reasonable to imagine that he would have opposed such an Establishment in his Church.

But the Gospel it self gives a clear and plain Distinction of the Degrees in the Evangelical Ministry; for our Saviour being willing to provide for the building of his Church, when he ascended on High, he appointed (r) *Apostles, Prophets, Evangelists, Teachers, and Preachers*, for the perfecting the Saints, for the Work of the Ministry.

'Tis true, in that elaborate Collection of *Blondell*, we are told, that about the latter end of the Second Century there was a Church formed without Bishops, which was governed by *Monks* and *Presbyters* for several Ages; and this was in *Scotland*; they were called *Culdees*: And this was before the coming of *Palladius*, who was the first Bishop that converted the Scots in *Ireland*.

But this must be an Invention of some Monk many Ages afterwards, for there is no Writer mentions these *Culdees* for above 500 Years after the Time of *Palladius*.

These *North Pits* were converted from *Heathenism* (and not from the Heresy of *Pelagius*, as some will have it) by *Columba*, a Scot, who came from *Ireland* about the middle of the Fifth Century, and founded a Monastery in the Island of *Hy*, as *Adamnanus* tells us, who was his Successor in that Monastery, and wrote his Life.

'Tis true, he was no more than an Abbot; but we are told in the *Saxon Chronicle*, that all the Bishops of *Scotland* ought to be subject to him, which must be in Point of Jurisdiction, and not of Order, for *Adamnanus* himself acknowledges the Episcopal Order to be Superior; and (s) Bishop *Usher* tells us; out of the *Annals of Ulster*, that there was a Bishop always near this Monastery, and that the Monks sent one from thence when King *Oswald* became a Christian; and this was to Convert the Men of *Northumberland*.

(r) Ephes. iv. 11, 12. (s) Usher de Prim. Fol. 701. And

And these were really *Bishops*, and not *Presbyters*, for they formed Churches, Ordained *Bishops* and *Priests*; they had a Jurisdiction over the Inferior Clergy; they excommunicated Offenders, and commanded Obedience to their Censures.

But certainly *Blondell* was mistaken in affirming, that there was a Church governed by Monks without Bishops, for there were no Monks in that Age; besides, Monkeny was never in any Nation but where Government was by Bishops, for the Monasteries, where the Monks resided, were the Schools and Universities, at that Time, where young Men were educated, and made capable of Holy Orders, and from thence were elected to be *Bishops*.

This Story related by him is generally thought to be a whimsical Invention of *John of Fordon*, who lived in the Eleventh Century; for none of the old *Scotch* Writers mention *Culdees* any where but at *St. Andrew's*, and not there till it was an Episcopal See.

They were called in the old *Scotch*, *Kildees*; that is, Men of the Bell-House; for they were the Dean and Chapter of the See, till, in a Contest about the Election of a Bishop, they lost their Places, and were supplanted by the *Canons Regular*.

The same Author likewise tells us, That *Palladius* was the first who established Episcopacy in *Scotland*, and this was about the middle of the Fourth Century; but he produces no Author to prove it, who lived near that Time, neither, indeed, could he; for it was a dark and ignorant Age, and the People had no Letters but what they had from the *Greeks* and *Romans*, and took little care to deliver to their Children in Writing what they had received by Tradition. And that may be the reason why we have no Account of any *British* Bishops before the Council of *Arles*, which was assembled by the Emperor *Constantine*, who was the Pupil of Pope *Sylvester*, and the first Patron of *English* Prelacy.

This was about the beginning of the Fourth Century, at which Time we read of three *English* Bishops present at that Council, viz. the Bishops of *London*, *Tork*, and *Carleon*; and from that Time they learn'd the Use of Synods.

The Emperor himself favoured the *British* Bishops; and the People, by degrees, laid aside that Reverence which they had for the *Druids*, and placed it wholly on the Bishops, who were in so great Esteem in that Age, that they called a National Synod against the *Pelagian* Heresy, without the Consent of the King, whom they excommunicated, and then suppressed that Heresy.

The *Saxon* Reigns were full of Commotions and Troubles, which lasted 150 Years before *St. Austin* was sent hither, who was called the *Saxon Apostle*; but the *British* Bishops would not allow him to have any Jurisdiction over them, for they sent him a Message in Writing by the *Abbot* of *Bangor*, that they were
subject

subject to the Church of God, and to the Pope, and to every godly Christian, to which they were bound both in Love and Charity; and any other Obedience they would not acknowledge to be due, even to the Pope himself.

These were the Principal Men in that Age, both for Wisdom and Learning, and therefore were always admitted to the Councils of their Kings; their Presence was a Sanctuary against all Force and Violence; the Words which they spake were *sine juramento irrefragabiles*; they assisted the Judges in all secular Causes: But they themselves had the sole Jurisdiction of all criminal Matters amongst the Clergy, their Tenants and Servants; and the Sentences pronounced by them in such Cases were always definitive.

Such Deeds, which were acknowledged before them for altering the Property of Lands, were never to be disputed; they had the sole Custody of all the Weights and Measures thro' the Land, and it was sufficient that they were in such good Hands, but they usually committed them to some of their Clerks. And 'tis from thence, that even at this Day, he who keeps such Weights and Measures, is called the Clerk of the Market,

But to return: We have not only an Account of some of our *British* Bishops to be present at the Council at *Arles*, but that in the first *Nicene* Council, which was held about 12 Years afterwards, there was a Canon made, which mentions both *Bishops, Priests, and Deacons*, and that the *Bishop* had the sole Power of Ordination and Jurisdiction; and the Canons made at that Council were received here as well as the Creed.

Sulpitius Severus likewise tells us, that several of our Bishops were present at the Council of *Ariminum*; and that their Bishopricks were so mean, that they lived there at the Charge of the Publick.

Gildas, who lived soon after the *Roman* Empire was subverted, and about 100 Years after the *Saxons* came hither, writes, that they being Heathens killed the Governors of the Church; by which he must mean Bishops, because he takes Notice, that those *Britains*, who had escaped their Cruelties, had Bishops among them.

Bede, who lived about 100 Years afterwards, gives an Account, that Pope *Gregory*, who sent his Missionaries hither, committed the Care of *Britain* to *St. Austin* the Monk, who, when he came, treated with those Bishops about the Supremacy; and the Result was, That they would not have him be their *Archbishop*.

From what has been said, it appears that there were Bishops very early both in *Scotland* and here; That the *Culdees* were unknown to those Ancient Writers, and likewise to *Nennius*, who lived many Years after them.

'Tis true, *Giraldus Cambrensis* liv'd about 100 Years before those *Culdees* were supplanted by the Canons Regular ; but he did not well understand their Original, and therefore he found out a *Latin* Derivation for the Word, and call'd them *Colidei* ; but we have no Author who asserts that they govern'd the Affairs of the Church, or that they were Monks, except *Hector Boethius*, who has form'd a History out of the Inventions of *Vermond*, Archdeacon of *St. Andrew's*, and the Monk of *Fordon*.

But as to us here in *England* ; we have a full and plain Account from our Ecclesiastical Histories, that the first Conversion of this Nation to Christianity was by Bishops, who were sent hither from several Parts to convert the *Saxons*.

Thus *St. Augustine* was made a Bishop by *Eleutherius* Archbishop of *Arles*, by the Appointment of Pope *Gregory*, who gave him Power over all the *British* Bishops ; and he settled his See at *Canterbury*, by the Leave of *Ethelbert*, in the Year 597, who was the King of *Kent*, and under him the Kingdom was brought to Christianity after this Manner : *St. Augustine*, with some other Monks, coming hither, the Queen dispos'd the King to hear them ; but the Conference was to be in the open Field, according to an ancient Superstition amongst the People, that if those Missionaries had us'd any Enchantment to deceive him, it might vanish and lose its Force in the open Air.

The King was satisfied with their Discourses and especially with the glorious Promises of Eternal Life, of which he could not see any Manner of Certainty from their Sermons, and therefore did not think it expedient to forsake what he had learn'd from his Ancestors, and to take up with Uncertainties ; however, permitting them to Preach he was at last Converted ; and, according to his Example, this Nation embrac'd the Christian Religion ; and the Conversion of the People was completed by the Tendernefs and Moderation of the King, who us'd no Force to compel Men to renounce their Superstitions.

About Seven Years afterwards the Kingdom of *Essex* was Converted by *Mellitus*, Bishop of *London* ; and 22 Years afterwards *Northumberland* was likewise Converted by *Paulinus*, first Archbishop of *York*.

Within the Space of Six Years afterwards the Kingdom of the East *Angles* was Converted by the same *Mellitus* ; and Three Years after that the West *Saxons*, by *Birinus* of *Burgundy*, who was first Bishop of *Dorchester*.

About Eighteen Years afterwards the Kingdom of the *Mercians* was Converted by *Finan*, Bishop of *Lindisfarne*, which is an Island in the North, where that See continu'd till remov'd to *Durham*.

The Men of *Sussex* and *Surrey*, about 26 Years afterwards, were the last of this Nation who were Converted ; for those Countries, by Reason of the Woods and Rocks were almost inaccessible to Strangers ; but *Wilfred*, who was then Bishop of the

the aforesaid See of *Landisfarne*, being expell'd his Bishoprick, appeal'd to *Rome*, and at his Return hither, was by the Power of *Egfrid*, King of the *Northumbrians*, driven from Place to Place till he came into *Sussex*, where he was kindly received by *Edelwalch* King of that Place, who gave him *Selfea* near *Chichester*, where he built a Monastery, which was afterwards made the Seat of the Bishop of that Diocese, till remov'd to *Chichester*.

And thus in Progress of about 86 Years this whole Nation gradually receiv'd the Truth by the Means of Bishops, and those whom they sent; so that the Original Constitution of the *English* Church may be truly said to be founded in Episcopacy.

The Bishops, who were so instrumental in Converting the *Saxons* as aforesaid, had each their Diocesses as large as the Division of the Seven Kingdoms, except in *Kent*, where the Archbishop had a Suffragan, who was the Bishop of *Rochester*; but every other Bishop was Universal, incumbent on each Kingdom, and liv'd in Common with the Clergy, whom they sent to Preach in several Parts; but after the Nation became Christian, those itinerant Clergy were laid aside, and a more convenient Ministry was settl'd by Degrees in particular Districts and Parishes, where the People might certainly resort to the Publick Worship.

After the Kingdoms were entirely United, and as the Number of Christians encreas'd, so did the Bishops too, and in Conformity to the Civil Government, they were also United under one Metropolitane, which continues to this Day.

Having said thus much of Bishops in general, I shall in the next Place treat of these Matters distinctly:

- (1.) The Age of Bishops, and the Way of making them.
- (2.) Their Privileges here.
- (3.) Their Peerage.
- (4.) Whether they are the Third Estate of the Kingdom.
- (5.) Their Jurisdiction over the Clergy.
- (6.) Their Jurisdiction in Cases of Blood.
- (7.) And lastly, What Leases made by them are good, and what not.

(1.) By the Canon he is requir'd to be Thirty Years of Age; 'tis true, there is no such Rule in Scripture; and this Canon hath often been dispens'd withal.

Then as to the Way of making Bishops; I find that in the Primitive Times, when a Bishoprick was vacant, the Bishops of that Country chose and ordain'd another to the vacant See, and the People had no Share in the Choice.

The Scripture tells us, that before the Law, the Priesthood was fix'd to the Eldest Son; and that after the Mosaical Dispensation, the Office of High-Priest was limited to one Family, which Hereditary-Right was never interrupted, unless for some Personal Defects, either in Body, or Extraction; or for some

some very great Crimes and Misdemeanors; and even then it was the great Council of the Jews, and not the Body of the People, who were the Judges of the Deprivation.

In the Gospel-Dispensation, our Saviour chose his own Apostles and Disciples; and after his Ascension, those very Apostles, and some of their immediate Successors were guided by Inspiration in the Election of Bishops, to which the People gave their Assent by loud Acclamations; 'tis true, they sometimes petition'd the Bishops to elect a particular Person: And tho' Pope *Celestine*, who liv'd about the Beginning of the Fifth Century, tells us, in one of his * Epistles, that *Cleri, plebis, & ordinis consensus & desiderium requiratur*; yet he likewise informs us, that the People ought to be taught, and not to be follow'd.

But long before that Time, the Provincial Bishops, upon every Vacancy, assembled to chuse another, and the Choice usually fell upon the Eldest Presbyter of that Cathedral where the deceas'd Bishop had presid'd, if qualify'd for the Office; but if not, then the Presbyters of that Church chose another out of their own Number; however, it cannot be deny'd that in Times of Persecution it might sometimes happen, that the People upon extraordinary Occasions chose their Bishop; but when Christianity was settled, such Elections were condemn'd by several Councils, as not agreeable to the Primitive Practice in such Cases.

But when the Churchmen became poor, and liv'd, for the most part, by the Charity of the People, it was thought convenient that they should be consider'd in the Election of their Bishops, and both the Laity and Clergy concurred in nominating him; and there might likewise be another Reason for it, because he who was to inspect all, might come in by a general Consent.

Thus we read when Cities were converted to Christianity, the Bishops were elected *Per clerum & populum*; but as the Number of Christians increas'd this was found to be very inconvenient, for (a) Tumults were rais'd, and sometimes Murders committed at such Popular Elections, and particularly at one Time no less than 300 Persons were kill'd at such an Election.

To prevent the like Disorders, the Emperors, being then Christians, reserv'd the Election of Bishops to themselves; but in some Measure conformable to the old Way; that is, when a Bishop died, the Chapter sent a *Ring and Pastoral Staff* to the Emperor, which he deliver'd to the Person whom he appointed to be Bishop of the Place.

The Popes, who were at the Head of the Church, were pleas'd to see Churchmen go rich, but they were not satisfied that they should have any Dependence on Princes, and therefore pretended that they took Money for nominating Bishops, or charged

* Epist. 3. fo. 737. (a) 2 Rol. Rep. 102.

their Revenues with Pensions; and they would not suffer them to take Institutions at their Hands, and thereupon the Canons in Cathedrals chose their Bishops, which were usually confirm'd at Rome.

This was certainly an Usurpation upon the Power of Emperors, a Power which had been maintain'd by them for 800 Years and upwards; but when the Empire was declining, and the Papacy growing in Riches and Grandeur, then Pope *Calixtus*, who liv'd about the Beginning of the Twelfth Century, depriv'd *H. 5.* of this Prerogative, which had been enjoined by him and his Predecessors for so many Ages, as *Pamelius* himself confesses in his Notes upon *St. Cyprian's* * Epistles; and that Pope assum'd this Power himself, which none of those, who sat in *St. Peter's* Chair, enjoined till then: And this appears above 200 Years before that Time in the † Epistles of Pope *John VIII.* who declares that the Consent of the Emperor is requisite to the Promotion of a Bishop, that he must be confirm'd by him, otherwise he hath not lawful Title to his Bishoprick; and this he acknowledges to be after the usual Custom.

With us here in *England*, our Princes had still some Power in those Elections; for we read in the *Saxon* Times all Ecclesiastical Dignities were conferred in Parliament; this appears by *Ingulphus*, who was Abbot of *Crowland* in the Reign of *William the Conqueror*, who tells us, that *A multis annis retroactis nulla erat canonica praelatorum Electio*, because they were donative by the Delivery of the Ring and Pastoral Staff aforesaid; the one signifying that the (b) Bishop was wedded to the Church, and the other was an Ensign of Honour always carried before him, and was a Token of that Support which they ought to contribute to the Government, or rather that he was now become a Shepherd of the Flock of Christ. *Hildebrand*, who was Pope in the Reign of the Conqueror, was the First who oppos'd this Way of making Bishops here; and for that Purpose he call'd a Council of 110 Bishops, and excommunicated the Emperor, *H. 4.* and all Prelates who receiv'd Investiture at his Hands, or by any Layman, *Per traditionem annuli & baculi*.

But notwithstanding that Excommunication, *Lanfrank* was made Archbishop of *Canterbury* at the same Time, and by the same Means, as *Malmsbury* tells us: But the *Saxon* Annals in *Bennet-College* Library are, that he was chosen by the Senior Monks of that Church, together with the Clergy and Laity of *England* in the King's great Council; and so was || *Anselme*, his immediate Successor, who did not scruple to accept the Bishoprick by the Delivery of the Ring and Pastoral Staff at the Hands of *William Rufus*; and this was the Man who afterwards contested the Matter with *H. 1.* in a most extraordinary Manner;

* Epist. 52. † Epist. 34. Bin. Tom. 3. par 2. fo. 13. (b) Co. Litt. 3440. a. || Ead. lib. 1.

for that King being forbidden by the Pope to invest Bishops, as his Predecessors had done by the Delivery of the *Ring and Staff*; and he not regarding that Prohibition, but insisting on his Prerogative, the Archbishop refus'd to consecrate those Bishops whom the King had appointed; at which he was so much incensed, that he commanded the Archbishop to obey the ancient Customs of the Kings, his Predecessors, or to quit the Kingdom.

The Contest grew so high, that the Pope interposed and sent two Bishops to acquaint the King, that he would connive at this Matter so long as he acted the Part of a good Prince in other Offices.

Thereupon the King commanded the Archbishop to do Homage, and to consecrate those Bishops whom he had made; but this being only a feigned Message, and the Archbishop having a Letter to the contrary, he refus'd to obey the King.

At last, after several Heats, the King yielded the Point of Investiture, reserving only the Ceremony of Homage of the Bishops in respect of their Temporalities, to which *Anselme* consented, so as it was done before their Consecration; and then the Archbishop consecrated those Bishops whom the King had chosen, with the Consent of *Anselme* and chief Men of the Kingdom, and promis'd that no Person elected to be a Prelate should be refus'd Consecration, because of the Homage he had done to the King.

But yet that very King, after the Death of *Anselme*, reasum'd his ancient Prerogative, and invested the very next Archbishop, who succeeded him, with a *Ring and a Pastoral Staff*, as *Matthew Paris* tells us; but it must be a Mistake, because the King had but very lately given up that Right: But 'tis certain that *Ralph*, who succeeded *Anselme*, was chosen by the King, with the Consent of the Bishops and chief Men of *England*.

About this Time the Popes endeavour'd to gain Elections of Bishops to themselves; and first they excluded the Laity, then the Suffragan Bishops, and at last the King himself; but I think they began without him first: For upon the Death of *Hubert*, Archbishop of *Canterbury*, the Junior Monks of that Place chose *Reginald*, their Superior, without the King's Knowledge, and sent him privately to *Rome* with 12 Monks to attend him, in order to be confirm'd there.

But for some imprudent Behaviour in his Journey, those Monks who chose him were very much offended, and thereupon they desir'd Leave of the King to chuse another; the King granted their Request, but intimated that they should chuse *John Grey*, then Bishop of *Norwich*, which was accordingly done; and the King sent the like Number of Monks to the Pope, to procure his Confirmation of the last Election.

At the same Time the Suffragan Bishops of that Province sent their Proxies to *Rome*, on purpose to oppose the Confirmation of the Bishop of *Norwich*, because the Monks had chosen him to be Archbishop without their Knowledge, and thereupon the Pope adjudg'd both the said Elections to be void and uncanonical, and persuaded the Monks of *Canterbury*, who were then at *Rome*, to chuse *Stephen Langton*, alledging, that tho' the Consent of the King might be necessary at home, yet it was not to be expected there, so they chose him Archbishop.

But the King was so very angry at their Choice, that he charged all the Monks of *Canterbury* with Treason, and sent some Officers thither to command them to depart the Kingdom, which if they refus'd, then to burn their Monastery over their Heads; but they left their Cell, and the King confiscated all their Goods.

After various Contests between King *John* and the Pope, he at last, *Anno 1215*, granted by his Charter, that all Cathedral Churches should be free in the Election of Prelates, and that he would not hinder them to chuse a new Pastor upon any Vacancy, provided that they would first ask Leave of him and his Heirs to proceed to such Election.

But some of the Historians of that Age do not mention any such Proviso in that Charter, but the contrary (*viz.*) that he granted them the freedom of Elections, without any Letter of Nomination or Recommendation of such Persons as they were to chuse: And this I rather believe to be the Truth, because his Kingdom was then under an Interdict, and the King himself was excommunicated, because he would not acknowledge *Stephen Langton* to be Archbishop; and several other Calamities befell the Kingdom, so that he was forc'd to comply to the Legate: And from this Time the Suffrages of the Provincial Bishops were lost in *England*, and the Right of Election declar'd by the Pope to be in the Dean and Chapter only, which in those Days were Monks, who were so entirely in the Service of the Pope, that he vacated their Elections at his Pleasure, especially when he had a Mind to prefer one of his own Favourites; so that the Election of the Chapter was of little Use, and the ancient Prerogative of Nominating to Bishopricks, was never afterwards fully restor'd till the Reign of *H. 8.*

'Tis true, this occasion'd frequent Contests between our Kings and Popes, but still the Crown did justly claim an Authority over all spiritual Things and Persons; and when Kings were willing to oblige any Pope in this Matter, they would recommend a Person to the vacant See; and the Person thus recommended had his Bulls dispatch'd at *Rome*, and, by a particular Warrant from the Pope, was consecrated and invested with the Spiritualities of the See.

And even when the Supremacy of the Pope was most exalted here, the Kings of *England* were never totally devested of this
ancient

ancient (e) Prerogative; for upon the Vacancy of a *Bishoprick* there issu'd a Writ out of the *Chancery*, to seize the Temporalities in the King's Hands; and before the new elected Bishops could be restor'd to them, he was to appear before the King, either in Person or by Proxy, and renounce every Thing in those Bulls which might be prejudicial to the Crown, or contrary to our Laws; and having taken an Oath of Fealty and Allegiance, there issu'd forth another Writ, reciting that all this was done, and by that Writ the Temporalities were to be restor'd. So that upon the whole Matter this Prerogative is not only establish'd by Usage and Custom, which in all other Cases gives a Right; but 'tis founded on the Civil Law, and is agreeable to common Right and Justice; for several Cathedrals have been built and endow'd by our Kings, and therefore 'tis but just that they should be Patrons of their own Foundations.

'Tis true, the Popes would often contest this Prerogative, which made some Kings grant this Privilege to Deans and Chapters, that they might elect their Bishop; but it was restrain'd with this Condition: First to demand Leave of the King to chuse, and after the Election to have his Royal Assent: This appears by the Statute made against *Provisors*, *Anno 25 Ed. 3.* where the King's Right to nominate Bishops is recognised, and the Inconveniencies which did ensue the Pope's Provisions are set forth.

But almost 200 Years before that Time, viz. *Anno 10 H. 2.* there was a solemn Recognition made of the Prerogatives of that King and his Ancestors, by the Constitutions of *Clarendon*; and amongst the rest it was decreed, that upon the Vacancy of a Bishoprick the King should send for the chief Persons of the Church; and the Election of another should be made in the King's Chappel with his Assent, and by the Advice of such Persons whom he shall call for that Purpose; This was openly read in the Presence of all the Bishops, who consented to it, and so did Archbishop *Becket* himself, tho' unwillingly, for which he afterwards did Penance, and the Pope condemn'd this Prerogative.

At last, in the 25th Year of *H. 8. cap. 26.* the Parliament pass'd an Act, that Bishops should not be any more presented to the Pope, or sue out Bulls from *Rome*; but that upon the Vacancy of any See the Person should be presented to the Archbishop; and likewise if an Archbishoprick should be vacant, the Successor should be presented to an Archbishop in the Queen's Dominions, or to Four other Bishops whom the King should appoint; that upon such Vacancy the Dean and Chapter should certify it to the Queen in *Chancery*, and pray that they may proceed to a New Election.

Thereupon the Queen grants a License to them under the Great Seal, to elect the Person, whom by her Letters Missive She hath appointed; and they are to chuse no other.

Within 26 Days after the Receipt of this License they are to proceed to Election, which is done after this manner:

The Dean and Chapter having made their Election, must certify it under their common Seal to the Queen, and to the Archbishop of the Province, and to the Bishop elected; then the Queen gives Her Royal Assent, under the Great Seal, directed to the Archbishop, commanding him to confirm and consecrate the Bishop thus elected.

The Archbishop subscribes it thus, (*viz.*) *Fiat Confirmatio*, and grants a Commission to his Vicar-General, to perform all Acts requisite to that Purpose.

Thereupon the Vicar-General issues forth a Citation to summon all Persons, who oppose this Election, to appear, &c. which Citation is affix'd by an Officer of the Arches, on the Door of *Bow-Church*, and he makes three Proclamations there for the Opposers, &c. to appear.

After this the same Officer certifies, what he hath done to the Vicar-General; and no Person appearing, &c. at the Time and Place appointed, &c. The Proctor for the Dean and Chapter exhibits the Royal Assent, and the Commission of the Archbishop directed to his Vicar-General, which are both read, and then accepted by him.

Afterwards the Proctor exhibits his Proxy from the Dean and Chapter, and presents the new elected Bishop to the Vicar-General, returns the Citation, and desires that three Proclamations may be made for the Opposers to appear; which being done, and none appearing, he desires that they may proceed to Confirmation, *In penam contumacie*; and this is subscrib'd by the Vicar-General in a Schedule, and decreed by him accordingly.

Then the Proctor exhibits a summary Petition, setting forth the whole Process of Election; in which 'tis desir'd, that a certain Time may be assign'd to him to prove it, and this is likewise desir'd by the Vicar-General.

Then he exhibits the Assent of the Queen and Archbishop once more, and that Certificate which he return'd to the Vicar-General, and of the affixing the Citation on the Door of *Bow-Church*, and desires a Time may be appointed for the Final Sentence, which is also decreed.

Then Three Proclamations are again made for the Opposers to appear, but none coming they are pronounc'd *Contumaces*; and 'tis then decreed to proceed to Sentence, and this is in another Schedule read and subscrib'd by the Vicar-General.

Then the Bishop Elect takes the Oaths of Supremacy, Canonical Obedience, and against Simony, and then the Dean of the Arches reads and subscribes the Sentence.

The Dean and Chapter are to certify this Election in 12 Days after the Delivery of the Letters Missive, or they incur a *Præmunire*.

And if they refuse to elect, then the Queen may nominate the Person by Her Letters Patents.

So that to the making a Bishop these Things are requisite, viz. Election, Confirmation, Consecration and Investiture; of all which I shall treat in their respective Places.

Upon Election the Person is only a Bishop *Nomine*, and not *In re*, for he hath no Power of Jurisdiction before Consecration.

In the Time of the *Saxons* all Bishops and Abbots sat in State Councils, by reason of their Office, as they were Spiritual Persons, and not upon account of any Tenures; but after the Conquest the Abbots sat there by Virtue of their Tenures, and the Bishops in a double Capacity, as Bishops, and likewise as (f) Barons by Tenure: And this appears, *Anno 11 H. 2.* when Archbishop *Beckett* was condemn'd in Parliament, for there was a Dispute who should pronounce the Sentence, either a Bishop, or a Temporal Lord; those who would have a Bishop do it, alledg'd that they were Ecclesiastical Persons, and that it was one of their own Order who was condemn'd, and so insisted that one of them ought to do it; but the Bishop replied, that this was not a Spiritual but a Secular Judgment; and that they did not sit there merely as Bishops, but as (g) Barons; and told the House of Peers, *Nos Barones vos Barones patres hic sumus.*

And in the very Year before, viz. *Anno 10. H. 2.* it was declar'd by the Constitutions of *Clarendon*, that Bishops, and all other Persons who hold of the King *In Capite*, have their Possessions of him *Sicut Baroniam*, & *sicut ceteri Barones debent interesse judicii Curie Regis*, &c.

And they ought to sit there likewise as Bishops; that is, not as mere Spiritual Persons, vested with a Power only to ordain and confirm, &c. but as they are the (b) Governors of the Church; and 'tis for this Reason, that in the Vacancy of a Bishoprick, the Guardian of the Spiritualities is summon'd to the Parliament in the Room of the Bishop; and the Five New Bishops of *Bristol*, *Chester*, *Gloucester*, *Oxford* and *Peterborough*, which were made by *H. 8.* have no Baronies, and yet they sit there as Bishops of those Sees by the King's Writ.

[His Peerage.] A Bishop being thus made, I shall in the next Place consider him as a Peer of the Realm.

The chiefest Objection against his Peerage is this, viz. By the Common Law all Trials in Capital Causes ought to be *Per pares*: Now, if a Bishop should be tried for a Capital Offence,

(f) Atterb. 367. (g) Seld. tit. Hon. 709. (b) Seld. tit. Hon. 96.

it must be by a Jury of Commoners, and therefore they say he is a Commoner and no Peer.

In answer to this I take it to be a very weak Argument, that because Bishops have been tried by Commoners out of Parliament, therefore they have no Right of Peerage in Parliament; for the Difference between them and the Temporal Lords, in respect of their Trials, may be thus, *viz.* The Temporal Lords are Peers by Descent, but the Bishops are Peers by Tenure; they have not their Peerage by Inheritance, as the Temporal Lords have; but still they are Peers in Parliament, and have a Right to Sit and vote there as Bishops and Barons; and therefore the different Titles which they have to their Peerage might at first occasion this Difference in their Trials.

Besides, Bishops were not always tried by Commoners; for *Anno 15 Ed. 3. John Stratford*, Archbishop of *Canterbury*, was tried in Parliament, and so was Archbishop *Arundell*, *Anno 21 R. 2.* without any Impeachment by the *Commons*.

And here I cannot but take Notice of the Nine Reasons, which, in the Year 1641, were sent with a Bill from the Commons to the Lords, against the Voting of Bishops in Parliament; and the rather, because I do not find them mention'd by the Noble Historian who opposed the Bill, which afterwards pass'd both Houses.

1. The first was because it was a great Hinderance to the Exercise of their Ministerial Function; and yet they are allow'd in all Reform'd Churches to attend General Councils, Synods, Convocations, &c. which is certainly a greater Hinderance to them than a short Attendance in Parliament.

'Tis not such an Hinderance as the Apostles put upon themselves, without any manner of Necessity, for they work'd for a Livelihood, because they would not be burthensom to others.

2. The second Reason was, because they vow and undertake at their Ordination, when they enter into Holy Orders, they will give themselves wholly to that Vocation.

But this is a mistaken Reason, for they make no such Vow; 'tis true, the Bishop exhorts them at that Time to give themselves wholly to it in a Moral and not in a Mathematical Sense, which will admit of no Latitude; for otherwise it would be a Fault for them to take any just and necessary Care to provide for their own Household.

3. The third Reason was, because they are forbidden by Canons and Councils to meddle in Secular Affairs.

But such Canons and Councils were never receiv'd here; for by the Common Law they have an undoubted Right to sit and vote in Parliament, and 'tis the Queen's Prerogative to summon them thither.

4. Because the 24 Bishops have a Dependence upon the Archbishops, by reason of their Canonical Obedience to them.

This is likewise a Mistake, for they have no Dependence on them, nor owe Obedience to them; but in Cases of Appeal and Visitation: They are *Pares* in Parliament; and 'tis a known Rule, that *Par in parem non habet imperium*.

5. Because Bishops have only Estates for their Lives, and therefore are not fit to have a Legislative Power over the Honours, Inheritances, Persons and Liberties of others.

If this should pass for a Reason, it might likewise be extended to the Knights, Citizens and Burgeses, who are chosen for one Parliament only, and do not sit there during their Lives.

Besides, the Bishops are not for their Lives only, but for their Successors also in the Honours and Lands which belong to the Church; and there are Instances of Temporal Peers for Life, as the Earl of *Surrey* was, and that for the Life of his Father; and yet this was never objected against his Voting there.

6. Because of the Dependency and Expectancy which Bishops have to be translated to Places of greater Profit.

If this is a Reason, it doth not reach the Archbishops, because they cannot be translated to Places of greater Profit; but it reacheth all Bishops by falsely supposing them to vote in Parliament, not according to their Consciences, but in hopes of being preferred; and 'tis a base and unmannerly Reflection on Princes, that they should be thought to promote Persons for such Votes.

7. Because Bishops had, at that Time, encroach'd on the Consciences and Properties of the Subject, and that would encourage their Successors to do the like; and that all Complaints against such Encroachments would be ineffectual, because the whole Order of Bishops here would be Judges of such Complaints.

This Reason cannot extend to those Bishops who were not guilty of such Encroachments, and certainly there were some of them innocent as to this Charge; but if all had been guilty, a Complaint made against them could not be ineffectual in Parliament, for voting as Judges in their own Cause, when 'tis generally known that they never vote in such Cases; but if they should, it would have no Effect, if they are justly charged, because they would be out-voted by the Temporal Lords, there being a great Inequality in their Numbers; This appeared very plain throughout the Reigns of *Ed. 3. R. 2. & H. 4.* when the Bishops were assisted with double their Number of mitred Abbots and Priors, but could not hinder the making Laws against the Encroachments of the Court of *Rome*, much less can they now hinder the redressing of any suppos'd Exorbitances of Ecclesiastical Power, when they have no such Assistance, and by consequence where there is a greater Inequality of Votes between them and the Temporal Lords.

8. Because 'tis the Interest of the whole Number of Bishops to maintain their Jurisdiction; that it was then found grievous

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8. Because 'tis the Interest of the whole Number of Bishops to maintain their Jurisdiction; that it was then found grievous

to the Three Kingdoms; that *Scotland* had abolish'd Episcopacy, and that Multitudes in *England* and *Ireland* had petition'd against it.

And 'tis probable greater Multitudes would have petition'd for it; but this Reason shews what was principally intended at that Time by all the rest, not against the voting of Bishops in the House, but against Episcopacy it self, which afterwards, thro' the Iniquity of the Times, succeeded.

9. The last Reason was because Bishops are Lords in Parliament, which makes a great Distance between them and the rest of the inferior Clergy, which occasions Pride in the one, Discontent in the other, and Disquiet in the whole Church.

This is an Argument (if I may call it so) deduc'd from moral Philosophy, which affords no Demonstrations; but certainly all are not proud who sit in Parliament, neither are all discontented who are out of it; and 'tis as certain that the wisest of the Clergy are very well satisfied, that some of their Profession are advanc'd to those Honours and Places in the Government, wherein they may be capable, upon all Occasions, of doing good Offices to them, and to this whole Church.

But since this Bill did afterwards pass both Houses, and had likewise the Royal Assent, it may not be improper here to give the Reader a short Account of it.

This Bill was the first Design against the Church, and was receiv'd in the House with a visible Approbation, and many of the popular Peers, at that Time lik'd it very well, because it was to deprive the House of those Persons who were most in the King's Interest; but the most plausible Reason was, that they ought not to sit there, because it was inconsistent with their Ecclesiastical Function to intermeddle with Temporal Affairs, and being remov'd from the Parliament, they might have fewer Diversions from their Spiritual Charges.

The Bill passed the Commons, but being sent up to the Peers it was not so much as committed, but rejected at the second Reading.

This exasperated the Party which was violent against them, insomuch that a Bill was brought soon into the House to extirpate Bishops, Deans and Chapters, with all Chancellors, Officials and their Officers; it was read but once, and then laid aside; but not long after it was reviv'd and read a second Time, and committed to a Committee of the whole House, but it was drop'd; for the leading Men, in each House, were not yet determin'd to change the whole Frame and Constitution of the Kingdom, whatever Malice they might have against some particular Men of that Order.

However, the first Bill against their Voting in the House of Peers, and for disabling them to exercise any Temporal Office, being rejected as above-mention'd, was, contrary to the Course of Parliaments, presented again in the same Sessions, and pass'd
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the House of Commons; but it depended a long Time in the House of Peers, who plainly saw that their Jurisdiction was invaded by this Bill; but the Virulency of the People was encreas'd against the Bishops, occasion'd chiefly by the Sermons, which in most Churches were so many Invectives against the whole Order, insomuch that both Houses having, not long before, taken a Protestation to defend the true reform'd Religion, express'd in the Doctrine of the Church of *England*, against all Popery and Popish Innovators; that is, to defend the publick Doctrine profess'd in the Church, so far as 'tis opposite to Popery and Popish Innovators: A Sermon was preach'd at *Westminster*, by the famous Mr. *Burton*, and soon after printed under the Title of the *Protestation protested*; wherein it was impudently asserted, that by the Protestation all Men were oblig'd to remove the Bishops and Common-Prayer out of the Church; so that by the one he must mean Papists, and by the other Popish Innovation.

And what was more ridiculous, a Petition was publish'd in the Name of the *London Apprentices*, and probably some of them had serv'd but a very little while; and this was directed to the King, attributing the Loss of Trade to the Papists and Prelates (which in those Times were usually coupled together to make them more infamous) that they stood engag'd to defend the King, and the Rights and Liberties of Parliaments against Papists and Popish Innovators, such as Archbishops, Bishops, and their Dependents appear'd to be: Then they desir'd the King to take Notice, that notwithstanding the Endeavours of the House of Commons to subdue Popery and Popish Innovators, it was yet ineffectual, neither were the Prelates remov'd, and therefore they desir'd that the Laws might be put in Execution against Priests and Jesuits, and that Prelacy might be rooted out, that so the Reformation might be carry'd on, and that Freedom of Trade might pass more chearfully.

This Petition was printed and scatter'd about the City, which so much incens'd the Mob, that the Clamour in the Streets was, *No Bishops, No Bishops*, who all withdrew their Attendance from the House.

After this they got a Petition from Persons of a meaner Degree than Apprentices, from the poorest and very Dregs of the People; and this was directed to the House of Commons, wherein those poor Wretches were made to complain of the approaching Stories of their Ruin, chiefly occasion'd (as they were made to say) by the Prevalency of Bishops, and their Miseries were insupportable, and that they could not tell where to get Bread for their Families; so that unless some speedy Remedy was taken, they could not rest in Quietness, but must be forc'd to lay hold on the next Remedy, to remove the Disturbers of their Peace.

This and some other contriv'd Petitions of the like Nature, occasion'd the passing this Bill, which was softened with the Title of *A Bill for taking away all Temporal Jurisdiction from those in Holy Orders*; to which the King was press'd to give his Royal Assent by these Reasons.

1. The Grievances which his People suffered by Bishops exercising Temporal Jurisdiction, and their making a Party in the House of Peers, would by this means be removed.

2. An universal Satisfaction of all sorts of Persons would appear in the happy Conjunction and Unanimity in both Houses, if Bishops were absent.

3. The passing the Bill would be a Pledge of his Majesty's gracious Assent to the future Remedies of those Evils which had been presented to him.

But these Reasons did not so much prevail on him as the Importance of the Queen; tho' those of the greatest Trust about him insisted, that the passing the Bill was the only Means to preserve the Church, because those Persons, who were powerfully combin'd in this Particular, would be so well satisfy'd in passing it, that they would no farther Attempt an Alteration; but if they were cross'd in this Matter, 'tis probable they would endeavour, with all the Malice and Violence imaginable, the utter Extirpation of the whole Order.

Those Arguments, and the Persuasion of the Queen, prevail'd on the King against his positive Resolution to give his Assent to the Bill.

Whether they are the Third Estate.] I shall in the next Place consider them, as they make the Third Estate of Parliament; and in doing this I must admit, that if they sit there by reason of their Baronies only, then they would be included with the Temporal Lords, and both represent but one Estate.

'Tis true, when they sit in a *Judicial Capacity*, as Members of the House of Peers, then they sit as Temporal Barons, and in that Capacity they vote; but when they sit in the *Legislative Way*, as in passing Bills of Attainder, then they represent a Third Estate.

And this appears by what I have mention'd before, *viz.* That during this Vacancy, &c. Writs have been directed to the *Guardians of the Spiritualities* to attend in Parliament; now those Guardians could not sit there by reason of their Temporalities, for they had none, because those were in the Hands of the King, from which 'tis evident that Bishops do sit there as Spiritual Persons; for otherwise, why should these Guardians of the Spiritualities be summon'd thither in the Vacancy of a See?

But the Writ of Summons it self is a farther Proof, that the Interest they have in Parliament is not *Per Baroniam* only, for that Writ distinguishes between them and the Temporal Barons; the one being summon'd to appear *In fide & dilectione*, the other *In fide & ligeantia quibus nobis Tenemini*.

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'Tis true, *Anno 50 Ed. 3.* in the Writs of Summons to Parliament, by the Clause *Præmunientes*, &c. the Bishops were to summon their Clergy to appear, *Per Procuratores ad consentiendum*; but these Words do not exclude them from being part *De Communi concilio Regni*, they signify that they were to give their Consent according to the Usage of these Times.

But many Years before that, viz. *Anno 23 Ed. 1.* the Clause was *Ad tractand. faciend. & ordinandum*; and much about the same Time the Writs for chusing Knights of the Shire were *Ad faciend. tunc quod de communi concilio ordinabitur*: And can it be infered from hence that they have no Votes in Parliament?

Anno 26 Ed. 1. it was, *Ad consentiendum*; the next Year it was *Ad faciend'*; and in the Year after it was, *Ad consentiendum & faciend'*; and so it continu'd to the 26th of *Ed. 3.* and hath been the general Form ever since.

The not rightly distinguishing between the Judicial and Legislative Capacity of the Bishops might occasion the Judges, (*i*) *Anno 7 H. 8.* to affirm, that the King might hold a Parliament without the Spiritual Lords; and their Reason was, because the Bishops sit in the House of Peers, not as they are Spiritual, but as they are Temporal Barons, which is a Mistake; for when they sit in the Legislative Way, they sit by Virtue of their Spiritualities, as representing a Third Estate.

There are some who will allow them to be one of the Three Estates of the Kingdom, but not of the Parliament; but this is what others call a Distinction without a Difference; for an Estate of the Kingdom, and an Estate of the Parliament are the same thing; for by the Constitution of our Government, there is no Estate of the Realm, but what either in a personable or representative Capacity is an Estate of Parliament: This appears by the Parliament, *Rot. 1 H. 4.* where we find that *R. 2.* appointed Two Proctors to declare his Resignation of the Crown, *Coram omnibus Statibus Regni*; now the King could not be one, for he had resign'd, and the Word *omnibus* must imply more than Two; so by consequence he must mean the Lords Spiritual and Temporal and Commons.

But I shall not insist upon the old Rolls and Authorities in this Matter, of which there are many more, but shall instance something nearer our own Time, viz. *Anno 1 Eliz. cap. 3.* in a Parliament then held, the Lords Spiritual and Temporal did declare, that they represented the Three Orders or Ranks of Men of this Realm; and this was the Opinion of our learned King James, viz. That by the ancient fundamental Laws of his Kingdom of Scotland, his Subjects there were divided into three Estates, therefore he was of Opinion, that he did not make one of these Estates there; and if not, he could not think himself one here.

This was also the Opinion of my (k) Lord Coke, where he tells us, that the high Court of Parliament consists of the King and the Three Estates of this Realm.

It has been objected, that Laws have been made when the Bishops have voluntarily absented, and likewise when they have been excluded from Parliaments; which Laws have been received by the Nation, and as valid as when the Bishops have been consenting.

I admit, that in Conformity to the Canons, they have withdrawn themselves in Cases of Blood; they have likewise absented upon other Occasions, as particularly *Anno 38 Ed. 3.* when a Law was made against the Provisions of the Pope, so *Anno 20 H. 3. cap. 9.* it was enacted, that a Child born before the Marriage of its Parents should be a Bastard; this Act passed without the Lords Spiritual, for they would not consent, because it was expressly against the Laws of the Church; but still they took Care to preserve their Rights by Proxies and Protestations, with a *Salvo jure*, when they saw it requisite; 'tis true, Laws have been made when they were excluded the House; but it doth not follow that it was lawful so to do, it rather shews the Authority of an angry King, who obtain'd such Laws against an undoubted Right, for thus it was:

Boniface VIII. made a Constitution, that the Clergy should pay no Taxes for their Spiritual Benefices without Leave from the Pope, and this upon Pain of Excommunication.

King *Ed. 1.* *Anno* the 24th of his Reign, having occasion for Money to carry on the Wars against *Scotland*, called a Parliament at *St. Edmundsbury*, which met on the 3d of *November*, and the Lay-Members unanimously consented to raise Money by a Tax, but the Clergy refus'd to consent; whereupon the King was very angry, but gave them Time to consider till the 13th Day of *January* following, to which Day they were adjourn'd to meet at *London*.

This Day being come the Clergy persisted in their Denial; the King (as one of our Historians tells us) was *Mutatus in Crudelem*, and forbid the Lawyers to plead their Causes, for he did not think them worthy of his Protection; and therefore he order'd the Sheriffs to seize all their Goods, which could be found upon their Temporal Estates, and to lock the Doors of their Barns, and encourag'd his Soldiers to affront them in all Places, so that they could not go about any lawful Business alone, but to secure themselves were oblig'd to go in Numbers; and his Anger proceeded so far, that *Excluso Clero concilium cum solis baronibus & populo habuit.*

This hath been produc'd as a notable Argument, to prove that the Bishops do not make a Third Estate, and particularly by Mr. *Bagshaw*, in his reading in the *Middle-Temple-Hall* a lit-

He before the Civil Wars, his Question was, Whether an Act of Parliament may legally pass with the Assent of the King and his Temporal Lords and Commons, all the Spiritual Lords being absent, or if present, wholly dissenting, and to maintain that it might be instanced that it was done in that Parliament, *Anno 24 Ed. 1.* And he tells us, that if the Law should be otherwise, our Religion would not be confirm'd by Parliament, because the Act of Uniformity, *Anno 1 Eliz.* pass'd when all the Spiritual Lords dissented; but I believe he was mistaken in their Number, for the learned (1) Bishop of *Sarum* mentions, that the Archbishop of *Tork*, the Bishops of *London*, *Worcester*, *Ely*, *Coventry*, *Chester* and *Carlisle*, and the Abbot of *Westminster* only dissented.

But certainly that Instance in the Reign of *Ed. 1.* can never be a good President, either against the Right of Bishops sitting in the House, or for the Validity of Laws made without their Consent; for it was an extravagant Execution of the regal Power against the clear and uncontested Right, and a plain Invasion of the Liberties of the People, by the Subversion of the very Constitution it self.

But admitting that the Act of Uniformity did pass without the Consent of all the Spiritual Lords, yet it did not pass *Excluso Clero*; for when they voluntarily absent, they always preserve their Right by Protestations; and if they were present, and all dissented, the Law is still good, because it was carry'd by the Majority of Votes; and this was Bishop (m) *Jewell's* Opinion in his Apology against Dr. *Harding*.

Of their Jurisdiction in Cases of Blood.] Before I leave them in the House of Peers, it may not be improper to consider their Jurisdiction there in Cases of Blood.

In the Primitive Times, Bishops attended the Cure of Souls, and intermeddled in no secular Affairs, but when they were chosen Arbitrators by contending Parties; and this was to reconcile those Quarrels which might occasion Christians to go to Law before Infidels.

When the Empire became Christian, those Determinations, which Churchmen made on such charitable Accounts, had a Sanction added to them by the Imperial Laws, and particularly by *Constantine*, who confirm'd all such Decisions, and afterwards they became of great Authority.

This encourag'd them to proceed in many other Matters which did not concern their Spiritual Office, and therefore about 100 Years after the Reign of *Constantine* the Great, they were forbidden by the famous Council of *Chalcedon* to meddle with any Secular Affairs.

Afterwards, when Churches were endow'd with Lands by Emperors and others, the Slaves often pass'd with the Lands;

(1) B. H. R. 2 Pl. 394. (m) Lib. 6. cap. 8.

and their former Masters having a Power over the Lives of such Slaves, by Consequence the Churchmen, to whom they were given, had the like Power, which was sometimes executed with Rigor; and that being an apparent Diminution of their Patrimony, it was agreed that Men should not proceed capitally against their Slaves: And about 200 Years after the aforesaid Council, it was decreed, in the Eleventh Council of *Toledo*, that Priests should not judge in Capital Cases, which Canon was receiv'd in all the Churches of the West.

But when *Charles* the Great, and other Princes in the West, and particularly the Kings of *England* gave the Bishops Lands and Dominions; they oblig'd them, by Virtue of those Donations, to attend to their State-Councils, and likewise to do other Services by Virtue of their Tenures.

By these Services their ancient Tenure in *Libera Eleomosyna* was alter'd, and King *William*, call'd the Conqueror, made them take their Temporalities in nature of Baronies, that is, they were to hold them of him, *In Capite*, by certain Duties: And this was such a Diminution of their Spiritual Empire, that the Popes of that Age, to discharge the Bishops of such Services, and to make them independent on the King, objected those Canons which had been made in Cases of Blood, as a just Excuse of their withdrawing in such Cases; and therefore, if they must attend, it should not be when Sentence of Life or Limb was to be given.

But Archbishop *Cranmer*, who was a Man of Learning, did not take those Canons to be Obligatory to him; for being one of the Privy Council to King *Ed. 6.* he sign'd the Warrant for the Execution of *Thomas Seymour*, Lord High Admiral of *England*.

And 'tis very probable these Canons were never confirm'd by the Papal Authority, either in Synods, or otherwise; but being grounded upon a plain Hypocrisy, 'tis certain they were never receiv'd here since the Reformation.

Now the Reason which the Canonists give, why Bishops should not be present in Cases of Blood, is, because they contract an Irregularity thereby, *Ex defectu lenitatis*, and yet they allow them to judge Hereticks, and to deliver them over to the Civil Power to be executed; and is not this a Judgment in Case of Blood? And can any Man in his Senses think, that 'tis salv'd by the Prayer of the Inquisitors? when the Heretick is thus deliver'd to Execution, *viz.* they pray he may not be hurt, either in Wind or Limb, when they know he will certainly be executed.

For these and other Superstitious Whimfies these Canons have not been receiv'd since the Reformation, but the Practice hath been quite otherwise; for the Archbishop of *Canterbury* was the first in Commission at the Trial of *Mary Queen of Scots*; and in the Reign of King *Charles* there were Ten Bishops, with
other

other Peers, appointed to examine the Evidence, upon the Impeachment of the Earl of *Bristol*; and the Noble (n) Historian tells us, it was unreasonably mov'd in the House of Peers, in the Earl of *Strafford's* Case, that the Bishops might have no Vote in passing that Act of Attainder; and that *Williams*, who was then Archbishop of *Tork*, without consulting any of his Brethren, declar'd his Opinion, that they ought not to be present, and offer'd not only in his own Name, but in the Name of the rest of the Bishops to withdraw, by which he betray'd a Fundamental Right of the whole Order, to the great Prejudice of the King, and to the destroying that Noble Person who could not otherwise have suffer'd.

Of their Jurisdiction over the Clergy.] About the Beginning of the Reign of *Car. 1.* there was a very great Dispute here between the Jesuits and other Catholicks, concerning Episcopal Jurisdiction; which was occasion'd by one *Richard Smith*, Bishop of *Calsedon*, who came into this Nation vested with the Power of an Ordinary over all the Catholicks here, and who endeavour'd to extend that Power over the Jesuits and other Regulars throughout this Kingdom; but he was oppos'd by them upon the Account of their pretended Privileges, by Virtue whereof they refus'd his; rather because the Charities which were formerly receiv'd by those Catholicks, were now apply'd towards the Support of the Character and Dignity of that Prelate, insomuch that they form'd a very strong Party against him, and made him retire into *France*.

His Retreat was follow'd with a Paper War, in which *Dr. Kellison*, Professor at *Doway*, lead the Van, who wrote in Defence of the Authority of that Bishop; he was answer'd by a Provincial of the Jesuits: And several other Books being wrote on each Side, the Dispute was carry'd so far, that it was made a Question, Whether the Episcopal Order was necessary to the being of a particular Church? Whether that Order was of Divine Right? Whether the People might be confirm'd without Bishops? Whether their Order was more Perfect than the Monastical? And lastly, Whether the Regulars were under the Jurisdiction of Bishops or not?

But certainly 'tis very reasonable that not only the Regulars, when they were here, but all the Secular Clergy should be subject to such Jurisdiction; for since Presbyters in the Church of God are subject to Failing, and because Faction and Schisms may arise *Inter pares*, where there is no Power; therefore to avoid this Mischief, there is a Necessity of a superior Order of Men to inspect and govern, to visit and reform any Disorders; and those are the Bishops.

When first they were establish'd here, they were to see that Churches might be built in their Diocesses, and to take Care to

(n) Hist. Refo. 1 Vol. 274.

fill them with Persons well qualify'd for the Ministry; and a Clergyman was neither to be admitted to a new Benefice, or to leave an old one, without the Leave and Consent of his Bishop.

They had Authority not only from Canons, but from the ancient Ecclesiastical Laws, which have not their Force from any Constitution of the Pope (for many of those Decrees were never receiv'd here) but from the Custom and Practice of the Church in all Ages, ever since Christianity was establish'd here.

Examination.] By these Laws they have Power to judge of the Ability of the Clerk presented to them; for the Bishop is an (o) Ecclesiastical Judge, and not a Minister in his examining the Clergy; formerly he had Two Months Time after the Presentation, but now, by the (p) Canon, he hath only 28 Days to admit or refuse the Clerk; which if he neglect, then the Presentee may have a Remedy against him in the Court of *Arches*, or Audience by a Process, call'd *Duplex Querela*; or he may have a *Quare impedit* at Common Law; which is more usual, and then the Bishop must shew some Reason for his Refusal.

The chief Thing in the Examination is to know, whether the Clerk is capable to discharge his Pastoral Office, * *Scientiâ & moribus*, if the Bishop is not satisfy'd in either, and a *Quare impedit* is brought against him, he must not plead a general Cause of Refusal, but he is to certify the Particulars; and therefore to say generally that the Clerk is *Inhabilis*, or *Criminosus*, is not sufficient, because a Person cannot be Criminal, without doing some Act which will admit a Trial, either in the Spiritual or Temporal Courts, according to its Nature.

Besides, in affirmative Pleas particular Circumstances are requisite to make the Fact clear, but in the negative Pleas 'tis otherwise.

I shall not enlarge on this Matter, because it would be only to repeat what the Reader may find in the Title *Admission*;

But must say, that when Christianity was first establish'd here, the Bishops of the respective Diocesses had the immediate Care of the Churches, and sent their Clergy, who at first liv'd in common with them, to serve the Cures in such Places as they thought convenient, but still within their own Diocesses; and it was their Care to see the Revenues of the Church dispos'd to proper Uses; for those who were maintain'd by those Incomes always had it *Episcopo dispensante*; this was expressly requir'd by the Apostolical Canons, and by the Councils of *Amsoch* and *Gangra*.

That when those Bishops saw a Necessity to fix the Clergy to attend that Service in particular Places; and when Lords of Mannors afterwards built and endow'd Churches, and by that

(o) 5 Rep. 57. 2 Inst. 632. (p) Canon 95. * See Title Preaching.

Means oblig'd the Clergy to a particular Attendance within certain Limits, which were call'd Parishes; tho' they consented that such Lords or Patrons should nominate Clerks to those Churches, yet it was still upon Condition that Bishops might be satisfy'd in their Qualifications and Abilities to perform the Service, so that the Bishops were always Judges of the Fitness of these Clerks, who were to serve the Cures in their Diocesses; and it was reasonable it should be so, because the Bishops had the Care of the whole.

'Tis no Objection to say that this Power, which is lodg'd in the Bishop, may turn to the Prejudice of the Patron's Right, by making his Presentation ineffectual, if he should not think the Clerk qualified; for 'tis a Trust repos'd in him by the Law, and cannot be so properly plac'd in any other Person, because he hath the Care of the whole Diocess as aforesaid.

'Tis a Trust allow'd by all Christian Nations where the Right of Presentation is own'd; and some Canonists, and particularly *Rebuffus*, have told us, that 'tis a damning Sin in a Bishop not to examine the Clerk presented; and that 'tis his Fault, and not the Patrons, if a Man not qualified should obtain a Benefice.

'Tis true, the Judgment of the Bishop is not conclusive in this Case, but the Party may appeal to the Supreme Ecclesiastical Court, and then the Archbishop is to judge of his Sufficiency.

However, the Bishop is first to examine him; 'tis expressly requir'd by the (q) Canon, which is thus:

The Bishop, before he admits any Person into Holy Orders, shall diligently examine him in the Presence of those Ministers, who shall assist him at the Imposition of Hands; and if the said Bishop have any lawful Impediment, he shall cause the said Ministers carefully to examine every such Person so to be order'd, provided that they who shall assist the Bishop in examining and laying on of Hands, shall be of his Cathedral Church, if they may conveniently be had, or Three other sufficient Preachers of the same Diocess; and if any Bishop or Suffragan shall admit any to Sacred Orders, who is not so qualified and examined, the Archbishop of that Province having Notice thereof, and being assisted therein by one Bishop, shall suspend the said Bishop or Suffragan so offending, from making either Deacons or Priests for Two Years.

After such Examination, and not before, the Way is open for Admission, Institution and Induction.

'Tis probable that this Canon had some respect to the (r) Statute call'd *Articuli Cleri*, by which 'tis enacted, That *de idoneitate Personarum presentata ad beneficium ecclesiasticum pertinet Examinatio ad iudicem ecclesiasticum, & ita est hactenus usitatum & fiat in futurum.*

So that the Bishop's Power of Examination, *De idoneitate Personæ*, was not then a new thing, for that Act was declarative of a Custom heretofore us'd in this Kingdom, by which it appears that the Bishops Right of examining Clerks was Part of the Common Law, as well as of the Canons.

I shall only mention some other (f) Powers and Privileges they have, because I have treated more largely of them under their respective Titles.

They have Power of accepting or refusing Resignations of Benefices, of Admissions to Benefices presentative or donative; of Deprivation, of Collusions of Lapse, of Institutions, &c.

2. They have likewise a Power of Ordination; and this they have as soon as they are consecrated, but 'tis not local and confin'd to their respective Diocesses, but 'tis an inherent Power wherever they are; and therefore the Archbishop of *Spalato* might have conferred Orders when he was here.

3. They have a Power of Jurisdiction, but not till after Confirmation; and this is limited to their respective Diocesses only, viz. they may excommunicate and punish (r) Offenders there, but not elsewhere.

They pay no Reliefs, because they come into their (u) Bishopricks by Succession, and not as Heirs by Inheritance; they enjoy the same Privileges with other Temporal Barons, for in real Actions they must have a Knight return'd of the Jury; they have Privilege of Hunting in the King's Forests, and they may maintain an Action, *De scandalis magnatum*.

I shall now mention something concerning Leases made by Bishops.

At Common Law a Bishop could not make a Lease for a longer Time than he was Bishop of that Diocese where the Lands were; but a Lease made by him, and confirm'd by the Chapter, was good for any Time whatsoever.

But it was found to be very Inconvenient; that a Bishop should have so little Power alone over the Estate of the Church, and so much when he was join'd with his Chapter; and therefore, by the Statute 32 H. 8. cap. 28. which is commonly call'd the *Enabling Act*, Bishops had Power to make Leases of Mannors, Lands, Tenements, or Hereditaments, for three Lives, 21 Years, without any such Confirmation by the Chapter.

Sir *Simon Degg* was of Opinion, that because that Statute did not extend to Leases made of the very Scites and Demesnes, &c. therefore about 18 Years afterwards, by another Statute, it was enacted, that Leases made other than for 21 Years, or three Lives, should be void.

But there may be another Reason assign'd for the making the Statute; for tho' by the Act 32 H. 8. Bishops alone were enabl'd

(f) Other Powers and Privileges.
(u) 2 Inst. 7.

(r) Palm 474.

to make Leases for 21 Years without Confirmation by the Chapter; yet that did not take away the Power they both had before; for notwithstanding that Act, the Bishop and his Chapter might make what Estate they pleas'd of the Lands of the Church; but because they should not exceed 21 Years, or Three Lives, therefore that Act was made.

The Leases to be made by Bishops, pursuant to the Statute 32 H. 8. must have these Qualifications.

1. They must commence from the making, and not *A die datæ*.
 2. If there is an old Lease in being, it must be absolutely surrendered without any manner of Condition, or it must expire within a Year after the making the new Lease.
 3. There must not be a double Lease in being at the same Time, viz. One for Years, and another for Lives.
 4. The Lease must be of Lands, Tenements, or Hereditaments, out of which an Annual Rent may be reserv'd, &c.
 5. It must be made of such Lands which have been usually let for the most Part of 20 Years before the making the new Lease.
 6. The yearly Rent reserv'd must be such as hath been usually paid for 20 Years next before the making the new Lease.
 7. It must not be made without Impeachment of Waste.
- Of all which I shall treat distinctly.

1. And First, The Lease must commence from the making, and not *A die datæ*, for that excludes the Day on which it was made; so if a Lease of Lands is made for 21 Years, *Habendum a datæ indenturæ*, when there were Four Years of a former Lease then in Being, 'tis void upon this Statute; but 'tis good upon the Statute 1 Eliz. hereafter mention'd, to bind the Successor, if confirm'd by the Chapter; for this last Statute doth not say that it shall be a Lease for 21 Years absolutely, and to commence immediately, but it must be for 21 Years from the Time of the Commencement; and this is the Reason why concurrent (*) Leases have been held good.

They distinguish in Cases of Tythes between a Lease for Years and for Lives; for if made for three Lives, *Habendum* from *Michaelmas* next after the Date of the said Lease, 'tis void, because Tythes cannot pass by way of (y) Reversion, where an Estate for Life is limited, tho' they may by way of Discharge or Retainer.

2. If there is an old Lease in being, it must be absolutely surrendered, or expire within a Year after the making the new Lease.

This must be understood where the Bishop makes a new Lease without Confirmation by the Dean and Chapter; but if more than One Year is in being at the Time of the making

(*) 1 And. 65. (y) Seld. 131.

the (2) new Lease, and 'tis confirm'd, such Lease is good.

3. There must not be a double Lease in being at one and the same Time; that is, a (a) Lease for Years, and another for Life.

These Leases for Lives must not be to one for Life, Remainder to another for Life, &c. but the (b) Lives must all ware together; for if 'tis otherwise the Leases are voidable.

Neither can (c) Bishops make Leases for 99 Years, determinable upon Three Lives; but a Lease to one for Three Lives is good, for 'tis the same in effect as a Lease to Three for their Lives.

4. The Lease must be made of Lands, Tenements, or Hereditaments, out of which an Annual Rent may be receiv'd, and not of Things which lye in Grant, as Fairs, Markets, Advowsons, Tythes, &c. and therefore Bishop (d) *Jewell* having made a Lease of a Fair in *Sherborne*, for Three Lives, rendring the Ancient Rent, which Lease was confirm'd by the Dean and Chapter; it was held void against the Successor, because a Fair is no more than a Franchise, out of which a Rent cannot be reserv'd.

So where the (e) Bishop of *Carlisle* made a Lease of Tythes, for Three Lives; this was likewise held void against the Successor, because he had no Remedy, either by Distress, or an Action of Debt for Rent; but if it had been a (f) Lease for Years of Tythes, it had been otherwise, because an Action of Debt may be brought for Rent, by the Successor, not upon any privity of the Contract; for he is not privy to the Contract of his Predecessor, but upon the privity of Estate, for he hath the Reversion; and therefore an Assignee of a Term shall be charged with the Rent, because it attends the Term.

As to the word Hereditaments in this Clause, it must relate only to such which are parcel of the Possessions of the Bishoprick thereof; if an (b) Archdeacon, having a Parsonage appropriated to his Archdeaconry, makes a Lease of the Glebe for 50 Years, and the Bishop being Patron, together with the Dean and Chapter, confirms it; This is not void against the Successor, because his Confirmation passeth no Estate; 'tis no more than his Assent to a Lease of parcel of the Possessions of his Archdeaconry, and not of the Bishoprick.

5. The Lease must be of such Lands which have been usually let for the most part of 20 Years before the making the new Lease.

As to this Matter; if 20 Acres of Land have been usually let, and a (i) new Lease is made thereof, and of Two Acres

(2) 4 Leon. 78. (a) More 253. 5 Rep. 2. (b) Cro. Car. 95. 6 Rep. 37. a. (c) 8 Rep. 70. b. (d) 2 Cro. 76. (e) Hardres 326. (f) Moor 778. 2 Cro. 173. (g) Raym. 18. 2 Sand. 303. (h) Cro. Eliz. 430. (i) 1 Inst. 44. b.

more which had not been usually let, reserving the usual Rent yearly; This Lease is not warranted by the Statute, because part of the Land was not usually let; and tho' more Rent was reserv'd for those Two Acres, yet that will not make the Lease good, because the Rent issueth out of the whole.

Anno 21 Car. 2. This Case happen'd, *viz.* Lands belonging to the Archbishop of *Tork* were let for Three Lives, by Lease, Dated *Anno 1604*, and there being one of these Lives surviving in the Year 1630, the Archbishop (who was then) purchased the Lease, and did not let the Land for the Space of 15 Years; and the Civil Wars coming on, those Lands were sequestred, and no other Lease made of them till the Year 1663: The Court was divided whether this was a good Lease or not; those who held it good, insisted that it must be so, because, otherwise any Bishop might keep Lands in his Hands for 15 Years, if he liv'd so long, and then such Lands could never afterwards be let.

But those who held the Lease void went upon this Reason, *viz.* That under the pretence of (*k*) ancient Leases, all the Lands would be demised, and none left for Hospitality, for that was the Reason why that Clause was inserted in the Statute, *viz.* That no Lands should be let but what had been let for the most part of 20 Years last past, &c. for if it had not been usually let for that Time, how could any Man know what was the ancient Rent?

It hath been a Question, whether Copyhold Lands are comprehended by the general Word (Lands) in this Statute, because they, being Estates at will, are not properly demisable; but it hath been adjudg'd such (*l*) Lands are within the Statute.

My Lord *Coke* was of Opinion, that if Lands were in Lease for 11 Years, next before the making the new Lease, 'tis sufficient, and that in such Case it shall be construed that they were usually let: But Justice *Twisden* held otherwise; for, that the Words in the Statute must import a more ancient Time of being in Lease, and (*m*) my Lord Chief Justice *Vaughan* agrees with him, that by the Words usually let, such Lands can never be intended which have been let but once; but the Words may be taken in Two Senses, the one for the repeated Act of Leasing, the other for the continuance of the Lands in Lease; and therefore Lands leased many Years since, tho' but for once, may in propriety of Speech be call'd Lands usually demised, that is, they have been in Lease, which he tells us is the received sense of those Words.

But what was not in Lease Twenty Years before the making the new Lease cannot be said to be let for the greatest part of that Time.

(*k*) *Sid.* 416. 1 *Lev.* 212. (*l*) *Moor* 759. (*m*) *Vaughan* 33, 34.

So if Lands had been anciently in Lease for Lives, and afterwards kept in the Hands of a Bishop for 20 Years, before the making the new Lease, this seems to be a good Lease to bind the Successor; for the intent of the Law was not to tie (n) Bishops strictly to the Words of the Statute, but to preserve the ancient Rent.

'Tis true, it must be once (o) demised, otherwise it cannot be known what was the ancient Rent.

(6.) The *Reddendum* must be of so much Rent which hath been usually paid for the Land within 20 Years, as aforesaid, and made payable to the Lessor and his Successors.

But if in an old Lease there is Rent reserv'd, and an *Heriot*; and in the new Lease the *Heriot* is omitted, the (p) Lease is good; for an *Heriot* is no more than a *Service*, 'tis not an Annual Rent, nor depending upon it.

So likewise, if there hath been some Variation in former Leases, yet if in the (q) new Lease the same Rent is reserv'd which was in the last, this shall be accounted the ancient Rent.

But if in the old Lease a certain Rent had been reserv'd, and a couple of Capons, and the same Rent is reserv'd in the new Lease made to a Man and his Wife, and the Husband covenanted to pay the couple of Capons: This was held by (r) my Lord *Hales* to be a void Lease, because in the first Lease the Capons were part of the Rent reserv'd, but in the last there was only a Covenant by the Husband to pay them, which would not bind the Wife if she surviv'd; and therefore that Covenant would not amount to a Reservation, which it would have done if both had covenanted.

Upon the whole Matter, 'tis plain, That by this Paragraph there must be a certain and determinate Rent express'd in the Lease; and therefore when a (s) Bishop made a Lease, rendring to him and his Successors the usual and accustomed Rent, and not mentioning how much, for this Reason the Lease was held void.

But if a whole Farm is let out in Parcels, which was usually let together, there a full Rent *Pro rata* makes the Lease good, because the Successor hath no Prejudice; and 'tis not necessary that the old Rent should be reserv'd out of the old Land; for if 'tis reserv'd out of less Land, the Lease is good, for the Reason abovemention'd, that is, the Successor is not impoverish'd, nor his Revenue diminish'd.

And as to the Rent *Pro rata*, a Bishop may have more of it, and better Tenants by Parcels than in Gross: 'Tis true, my Lord Chief Justice (t) *Vaughan* held that the old Rent must be reserv'd out of the old Land, for otherwise the Bishop may de-

(n) Sid. 416. (o) Cro. Eliz. 875. (p) 6 Rep. 38. 2 Cro. 76. 1 Inst. 44. b. (q) Hardres 326. (r) Hardres 325. (s) Cro. Car. 25. (t) Hardres 326.

use less Land at the old Rent, and there may not be sufficient Distress to be had on such Land to satisfy that Rent.

But 'tis generally agreed, that the old Rent issuing out of an old Farm may be apportioned *Pro rata*; but if Part is let and Part unlet it may be doubted.

7. The Lease must not be made *without impeachment of Waste*, and therefore if 'tis made to one for Life, Remainder to another for Life, and so to a Third for the like Estate; tho' these are Three Lives according to the Statute, yet this Lease is void against the Successor, because the intermediate Estate for Life makes the Tenant in Possession punishable for Waste.

But the Bishops were enabled by the aforesaid Statute 32 H. 8. to make Leases, &c. for Three Lives, or 21 Years, *without Confirmation*, yet they were not restrain'd by the Law (as I have before observ'd) from that large and ancient Power which they had before in making long Leases, &c. *with Confirmation*; and therefore, (u) Anno 1 Eliz. it was enacted, *That all Estates made by Bishops of any Lands or other Hereditaments, parcel of the Possessions of their Bishopricks, or united, or appertaining to the same, to any Person or Persons, other then for 21 Tears, or Three Lives, from the Time of such Estate made; and whereupon the accustomed or yearly Rent, or more, shall be reserv'd, and payable, during such Term of Tears or Lives, shall be void.*

Before I shall treat particularly on this (x) Statute, I must take Notice that there is a Difference between Leases made by a Bishop *De facto*, and those made by a Bishop *De jure*; for in the first Case, tho' such a Lease is confirm'd, it shall not bind the Successor, because 'tis a Voluntary Act, which he might have omitted without Prejudice; but all Admissions and Institutions by a Bishop *De jure* are good.

This Law was made purely for the benefit of the Successor, and therefore where a Lease is made by a Bishop, and not Prejudicial to his Successor, tho' it wants some other Circumstances, it shall not be void; as for Instance, (y) a Lease made by a Bishop, *Habendum a die Indentura*, rendring the ancient Rent, and confirm'd by the Dean and Chapter, tho' there were Four Years of a former Term in being, yet this is not void, because 'tis no Injury to the Successor; 'tis true, it cannot commence in Interest presently, because the former Lease was not expir'd; but it commences by way of Estoppel, so that the Successor will be entitled to Two Rents, one in Interest and the other by Estoppel.

Such Lease is void upon the Statute 32 H. 8. because there is a former Lease in being, but not upon this Statute, because 'tis capable of a Confirmation; and being confirm'd shall bind the Successor.

(u) 1 Eliz. cap. 19. (x) 2 Cro. 552. (y) Moor 107.

But no Confirmation will make the double Lease good, that is, where a Lease for Lives is made before a Lease for Years expires, because this (1) Statute is in the Disjunctive, *viz.* That a Lease shall not be good other than for 21 Years, or Three Lives, which shews that both cannot be good at one and the same Time.

Besides, the accustom'd yearly Rent must be paid during the (a) Term for Years, or Lives, which cannot be in Cases of such double Leases; for if the Lessees for Life should enter, the Successor hath no Remedy against them for the Rent, either by Distress or Action of Debt, if the Lease for Years is not expired; and he cannot have an Assize, for he never had any Seisin, so that there is a Possibility that the Lessees for Life may for ever be discharg'd of the Rent, because they may die before the Lease expires; but if they survive, then the Successor hath a Remedy for the Arrearages.

In the next Place 'tis to be observ'd, that this is a private Act of Parliament, for it concerns Bishops only; and therefore cannot be given in Evidence, but must be pleaded.

That all Leases made by Virtue of this Act must have the same Restrictions as requir'd by the Act 32 H. 8. though there are some Variations between these Statutes; as for Instance, the Statute 32 H. 8. requires, that Bishops Leases should be made of Lands *usually let for the space of 20 Years last past*, which Clause is left out of the Statute 1 Eliz. but there are Words which amount to it, *viz.* That the *accustom'd yearly Rent shall be reserv'd*, which cannot be if the Lands had not been usually let.

So that the Statute 32 H. 8. requires, that the old Lease should expire or be surrendred, within One Year from the making the new one, which is not requir'd by (b) 1 Eliz. And tho' that Statute enacts, that all Estates made by Bishops, of any Lands, parcel of their Possessions, of their Bishopricks, other than in the manner therein prescrib'd, shall be void, and doth not enjoin that the Lease shall be of Lands usually let, or that the old Lease should expire, &c. yet it must be made of such Lands, and the old Lease must be expired or surrendred within a Year, &c. otherwise the new Lease is void against the Successor, unless confirm'd by the Dean and Chapter.

So the Statute 32 H. 8. requires, that the Estate should be made of Lands, out of which a Rent may be reserv'd; and therefore a Grant of the next Avoidance is not good, after the making this Statute, tho' confirm'd by the (c) Chapter, because there can be no Rent reserv'd out of it, but it is good against himself; for it was not the intent of the Law to bind the (d) Bishops in Possession, so that they could not do any Thing to

(1) 1 Mod. 204. (a) 5 Rep. 2, 3. 1 And. 193. Cro. Eliz. 141.
(b) Bridg. 30. (c) Cro. Eliz. 2, 690. (d) 10 Rep. 60. b.

bind themselves or their Lands, during their own lives; for then they could not Lease any Land which had not been usually let before the making these Statutes, but must manure such Lands by their own (e) Servants; neither could they have any benefit of Wastes, but only to take the Herbage with their own Cattle.

Offices.] There are some *Offices* which may be comprehended under the Words in this Statute, and accounted as *parcel of the Possessions of the Bishoprick*, or at least as appertaining to the same; and tho' the Bishop cannot exercise such *Offices* himself, yet he hath an Inheritance in the Gift and Disposal thereof, and these are such which are ancient *Offices*; the Grants whereof, with their (f) ancient Fees, *confirm'd by the Dean and Chapter* are made good, by the Intention and Equity of this Statute, tho' not warranted by the express Words.

But tho' such ancient Grants are allow'd for Necessity, yet they ought not to be accompanied with a new Charge, for that would be a Diminution of the Revenue, and impoverish the Successor; and 'tis agreed on all Hands that this Statute was made for his Benefit.

Therefore where a (g) Bishop was seised of a *Park*, to which the Office of a *Keeper* anciently belong'd, which he granted with the usual Fee, *Nec non cum Pastura pro duobus Equis in eodem Parco*, tho' this was confirm'd by the Dean and Chapter, yet this Court were divided whether it was good against the Successor; they all agreed that it was void as to the Pasture, because it was of a new Thing never granted before; but whether that Addition made the other Part of the Grant void was the Question? Upon which they were divided: Some were of Opinion that these were distinct Grants, and that one should be good, and the other void, against the Successor.

So where the ancient (h) Fee hath been increas'd in a new Grant; some are of Opinion that the Grant of the *Office* it self is good, and likewise so much of the ancient Fee which was granted, but the rest shall be void.

But in all these Grants of (i) Fees it must appear in Pleading, that they are *ancient Fees*; for tho' the *Office* is ancient, yet if the Fee is not so too, the Grant is void.

And 'tis to be observ'd, that all these (k) Grants are to be made *as usual, before the making this Statute*; therefore a Grant of an *Official* by an Archdeacon, or of a Commissary by a Bishop, is void against the Successor, if granted in Reversion where it was usually granted in Possession before the Statute; for these *Offices* are *Hereditaments*, and belong to Bishops and

(e) 1 And. 244. Cro. Eliz. 207. 1 Leon. 205. Cro. Eliz. 609. 2 Cro. 173. (f) 10 Rep. 62. (g) Bridg. 29. Cro. Car. 47. Lev. 7. (h) 2 Brownl. 237. (i) Brownl. 182. (k) Cro. Car. 258, Jones 263. Winch. Lut. 22.

Archdeacons, and so are comprehended by the very Words of this (1) Statute ; and therefore if they were granted in Reversion before the Statute, they may be so still, but not without Confirmation.

So a Grant of the Official or Chancellorship to Two, and the longer Liver of them, is good, if confirm'd by the Dean and Chapter ; for tho' tis a Judicial Office, and * they may differ in Opinion, yet that can be no Inconveniency, because the Bishop himself may sit as Judge when he will,

Some are of Opinion, that if a Bishop grants the Office of a Commissary, 'tis good only during his Life ; for tho' an Ecclesiastical Jurisdiction may be executed by a Substitute, yet his Acts are in Law the Acts of him who deposes him, for which he must be answerable, and not the Deputy. So that if such a (m) Grant should be good against the Successor, then he must be liable to the Acts of a Person whom he never deputed, which seems very unreasonable.

However, the Grant of the Office of a Register, for Life in (n) Reversion, hath been held good, and that 'tis sufficient Evidence to produce but one Grant thereof before the Statute ; for that may be an Inducement to believe that it was anciently so granted.

And generally the Grants of such Offices for Life are good, if they are ancient and necessary Offices ; for if a Bishop had not Power by Law to dispose of such Offices for the Life of the Grantees, he would be ill serv'd by Men whose Titles were so precarious.

But if he should grant such an Office for Life, and afterwards to another in Reversion, such Grant is void, and so it is where an Office is granted to Two for Life, if not usually so granted before the making this Statute.

Therefore the Bishop of *Salisbury*, Anno 11 Jac. granted the (o) Stewardship of his Mannors to Two for Life ; and 20 Nobles Fee, issuing out of Lands, parcel of his Bishoprick, to be exercis'd by them or their Deputies, which was confirm'd, &c. but held void against the Successor ; For, tho' a Bishop may grant an ancient Office to one, and there is a Necessity that such Grant should be good, for the Reason abovemention'd, yet there is no Necessity that he should make such a Grant for Two Lives ; but if he should, and one of the Grantees dies in the Life-time of the Bishop, who made the Grant, and then he dies, so that there is but One Life in being against the Successor, yet the Grant is void against him ; for it was void when first made, and shall never be made good by any Contingency.

(1) 2 Rol. Abr. 154. Jones 311. * Shower 288. (m) Nay 153. (n) Cro. Car. 279. Jones 310. Manch. 38. Cro. Car. 555. 2 Rol. Abr. 153. Winch, Entr. 22. (o) 10 Rep. 59.

Upon the whole Matter ; as a Bishop may grant an ancient (p) *Office*, with the usual Fee, so he may grant a new *Office*, which is of Necessity for him to Grant, and with a reasonable Fee; and such Grants shall be good against the Successor, if confirm'd by the Dean and Chapter : And therefore, in the very same Year in which this Statute was made, the Bishop of *Ely* granted the Office of *keeping his House and Garden*, with a Fee of 3 l. *per Ann.* this was held good against the Successor, tho' there was never any such Grant before, because the *Office* was necessary.

And yet but Three Years afterwards, *Horne*, Bishop of *Winchester*, granted a Rent of 3 l. 4 s. 6 d. to Dr. *Dale*, a Civilian, *Pro Consilio impensq & impendendo*, it was made a Quære in *Dyer*, whether it was void against the Successor ; but afterwards held that it was, because such a (q) Grant is not of Necessity ; and it was not of an *Office*, but only a voluntary Act of the Bishop to chuse such a Man to be his Council, which his Successor might not approve.

Before I conclude this Title, I think it not improper to give a short Account of *Bishops Suffragan*, tho' there are no such now in *England* ; and this I rather do, because grave and learned Men are of Opinion, that if this Order was reviv'd, it would be of great Use to the Government of the Establish'd Church.

In the Primitive Times there were *Chorepiscopi* plac'd in the largest Villages of every Diocess, who were Men in Episcopal Orders, and were originally appointed to supply the Cure of aged and infirm Bishops, in matters of Orders only, and not in Jurisdiction ; and even in such Cases they had no Authority, but what they receiv'd by Commission from that Bishop, whose *Suffragans* they were,

This continu'd in the *Western Church* from the first *Nicene Council* to about the middle of the Ninth Century, for the space of 500 Years and upwards, and then they were abolish'd every where by Degrees, upon a pretended Reason that they encroach'd too much upon the Powers and Privileges of the Bishops ; but the most probable Reason was thus ;

¶ It was about that Time that the Power of the Popes was greatly exalted in this part of the World, and to establish the same in all succeeding Ages they endeavour'd to influence every general Council, which they did, by securing to themselves a Majority to Votes, as they should direct.

They were often obstructed in this Design by the *Chorepiscopi*, who, having an immediate Dependence on their own bishop, and who seldom did any thing of Moment without his License or Commission, did therefore usually receive Instructions from him, in what manner to vote in these Assemblies.

(p) Cro, Car. 48. (q) *Dyer* 370. 10 Rep. 61.

Now to bring this order of Men entirely to the subjection of the Pope (which could not be done, so long as they were chosen and appointed to their Office by their own Bishops) it was thought expedient to lay aside the Name, and to vest other Men with the same Office, but under a new Name; and these were ever afterwards to be chosen by the Pope himself, and instead of *Chorepiscopi* were call'd *Suffragans*; and these were to assist the Provincial Bishops in consecrating Churches, in ordaining Priests and Deacons, in visiting the Churches under their Charge, and in supplying the Place of the Bishop in every Thing; for which they should have a Commission from him: And thus it continu'd here, from the Reign of *William* call'd the Conqueror, to the Reign of *H. 8.* that is, the Popes in all that Time made Titular Bishops, who had their Titles *In partibus Infidelium vel Hæreticorum*; and as the *Chorepiscopi*, who were entirely nominated and appointed to that Office by the Bishops, had for that Reason a Dependence on them; so these Titular Bishops, being now made and appointed by the Pope, had for the same Reason a Dependence on him, tho' they were Coadjutors and Suffragans to Bishops here, of which I shall give but one Instance, tho' many more may be found in those * Authors who have treated of this Matter, viz. *John Hatton*, Bishop of *Negropont*, which is a very large Island in *Greece*, was made by Pope *Julius II.* Suffragan to the Archbishop of *Tork*, Anno 18 *H. 7.*

But when the Papal Power was declining here, which happen'd about the 25th Year of *H. 8.* a † Statute was then made, prohibiting any Person to be presented to the See of *Rome* for the Dignity of an Archbishop or Bishop; but that upon a Vacancy the King should send his Letters Missive to the Dean and Chapter, licensing them to elect the Person therein nam'd, and prohibiting them to chuse any other; and in the very next Year another ‖ Law was made, declaring what Cities and great Towns should be Sees of *Bishops Suffragans*, and enacting, that every Archbishop and Bishop, who shall be dispos'd to have Suffragans, should present Two Persons to the King, humbly requiring him to allow one, who shall thereupon be call'd Bishop Suffragan of that See, who by the Kings Letters Patents shall be presented to the Archbishop of the respective Provinces to be consecrated to that Dignity, which he is enjoined to do within Three Months after the Receipt thereof; the Form of which Mandate to Archbishop *Cranmer* may be seen in my Lord of (a) *Sarum's* Collection of Records, in the very next Year after that Statute was made, requiring him to consecrate *Thomas Manning*, Prior of the Monastery of *Busley*, to be Bishop of *Ipswich*, and Suffragan to the Bishop of *Norwich*; and the Names of the other Suffragan Sees are as follow :

* *Anglia Sacra*, Vol. I. fo. 64. *Athen. Oxon.* Vol. I. pag. 557.
 † 25 *H. 8.* cap. 20. ‖ 26 *H. 8.* cap. 14. (a) *B. H. R.* 1 Pars
Col. Rec. 120.

Bishops.

Suffragans.

Bath and Wells.
Bristol.
Canterbury.
Carlisle.
Coventry and Litchfield.
Durham.
Ely.
Excester.
Gloucester.

Lincoln.

London.

Norwich.

Salisbury.

Winchester.

York.

{ Bridgwater.
Taunton.
Bristol.
Dover.
Pereth.
Shrewsbury.
Berwick.
Cambridge.
St. Germans.
Gloucester.
Bedford.
Grantham.
Huntingdon.
Leicester.
Colchester.
Ipswich.
Thetford.
Marlborough.
Molton.
Shaftsbury.
Guilford.
Southampton.
Hull.
Nottingham.

This Statute is still in Force, by which the Bishops have full Power to appoint *Suffragans*, not only to assist them in matters of Orders, but in Jurisdiction likewise; for they may make them their Chancellors if they think fit, and certainly they are more capable than Laymen to judge of those Things which relate to their own Order.

Blasphemy.

Is an Offence. { 1. By attributing to the Almighty any Thing unbecoming his Godhead.
2. By derogating from his Attributes.
3. By attributing that to the Creature which is due to God alone.

IT was so great an Offence, that *Moses*, tho' a wise Lawgiver, could not determine what Punishment to inflict on a Blaspheming Jew, until he had enquir'd of God what was fit to be done, who commanded that he should put the Blasphemer out of the Camp, and that all the People should stone him to Death; which was executed with great Severity, and was afterwards a standing Law amongst the Jews, which sudden Punishment may even at this Time make those tremble, who blaspheme the Name of

of God, for he seldom mitigates the Severity of those Laws which were expressly made by himself.

Afterwards there were various Punishments for this Crime; *Justinian* the Emperor punish'd it with Death; sometimes it was punish'd by cutting out the Tongue: But by the Civil Law the Punishment did not extend to Life or Limb; for a Layman was to be anathematiz'd, and a Churchman depos'd; and by the Canon Law, if the Blasphemy was committed publickly, the Offender was to undergo publick Penance, but even in that Case a Bishop could absolve him, but for a private Blasphemy any Priest might do it.

Our *Saxon* Ancestors were not guilty of this Crime, for amongst their Laws there is no Mention of any such Crime or Punishment for it.

H. 3. appointed that Blasphemers should be arrested, but doth not tell us how they should be punish'd.

King *Ed. 6.* being empower'd by Act of Parliament, appointed Commissioners to reform Ecclesiastical Laws, and Archbishop *Cranmer* was the first in Commission, who did the whole Work almost himself; but tho' it was finish'd, it never had the Royal Confirmation, for that was prevented by the Death of the King.

However, I mention'd it to shew what Punishment the Reformers of these Laws thought proper to inflict on Blasphemers, viz. That they were to be incapable of any publick Trust and Employment; they were not to be suffer'd to be Witnesses in any Court, or to any Will, and were not to have the Benefit of the Law.

By the (r) Canon this Offence is to be presented to the Ecclesiastical Court, in order to Punishment: 'tis comprehended there under the Words of *Wickedness of Life*, for 'tis not expressly nam'd, as Adultery, Whoredom, &c. and other Crimes are.

'Tis likewise punishable by the Common Law, and that by way of Indictment or Information; for all Reproaches of God, or of the Establish'd Religion; as to say, that 'tis a Cheat, or the like, tend to the Dissolution of the Government it self; for the Christian Religion is part of the Law of the Land, and to call it a Cheat takes away all manner of Obligation to the Government; and for this Offence one *Taylor*, Anno 27. Car. 2. was fin'd 1000 Marks, and was committed until he found Sureties for his good Behaviour during Life, and was set in the Pillory three Times, with a Paper fix'd upon it shewing his Offence.

Besides, Blasphemy generally tends to incite the People to Rebellion, and to depose the Queen; of this we have a famous Instance in Queen *Eliz.* Reign, of *Hackett*, *Arthington* and *Copinger*; the Two last made *Hackett* equal with *Jesus Christ*, and he affirm'd himself to be anointed King of the Earth by the Holy

Ghost; and commanded his Two Disciples to proclaim thro' the Streets of London, that Christ was come to judge the World, and that they might see him at the House where Hackett lodg'd, and that all who refus'd to obey him should destroy each other, and that the Queen should be dethron'd.

He was convicted of High-Treason, and at the Place of Execution this was his Prayer, viz. *Æterne Deus, tu me nosti verum Jehovah quem misisti, Miraculum aliquod ex nubibus ostende his Infidelibus, & libera me ab his Inimicis meis; sin minus, Celos succendam, & te a Throno detractum Manibus meis lacerabo.* This is what Fitz Simon tells us, but Camden himself relates the same Blasphemy almost in the same Words, and adds something more execrable, viz. Turning himself to the Hangman, who came to put the Rope about his Neck, he said, *Tunc Spurie Hacquetum Regem tuum suspendes?* And lifting up his Eyes towards Heaven he spoke with more Fury, *Pro Regno collato rependis, venio ulturus.*

Bonds of Resignation.

THE Question which I shall examine under this Title, is, Whether a Bond with a general Condition to resign upon Six Months Notice is good or not.

Those who hold such a Bond good, affirm there is no Positive Law against it; but on the contrary, there is a solemn * Judgment given in the Court of Queen's-Bench, that the Bond is good, because there is nothing bad in the Condition, that being only to resign upon Notice; and that which gives a greater Authority to that Judgment, is, that it was affirm'd upon a Writ of Error in the Exchequer Chamber, where all the Judges were of Opinion, that it was lawful for a Man to bind himself in a Penalty to resign, because that may be for good and valuable Purposes; as to resign if he take another Benefice, or to resign when the Son of his Patron comes of Age.

The (f) Bishop of Worcester himself, who argues against the validity of such Bonds, allows that there may be a lawful Trust in such Case for a Minor; but if the Person enters into a Bond to resign, then he calls it a confidential Simony.

I wish he had told us, that since there can be such a Trust, what legal Obligation there could be to compel the Performance of it when the Minor comes of Age, and how that Trust shall be executed if the Parson shall refuse to resign.

But he will not allow that the Judges gave a tolerable Reason to support their Judgment, for it amounted to no more than that a Bond is good, because a good Reason may be given for it, which deserves no other Answer than that it may be bad, because a bad Reason may be given for it; and he instances several

* Jones---- vers. Lawrence. 2 Cro. 248, 274. (f) Still. 342. such

such bad Reasons, *viz.* Such a Bond makes a Parson a Slave to his Patron, and subverts the just Rights of the Clergy.

I shall only say, that this is to arraign a solemn Judgment given by all the Judges of *England*, in the Case above-mention'd, and there were some of them Men eminent in their Profession; for my Lord *Coke* was then chief Justice of the *Common-Pleas*, and *Tanfeild* chief Baron of the *Exchequer*; and the Court judg'd only of the Law, as it appear'd before them, upon the Bond with such a general Condition to resign upon Notice; there was nothing of Simony appear'd to them; and if such a Bond might be given upon a good Reason, as the Bishop admits it might, why must it be suppos'd to be void, because an ill Use may be made of it, for that is contrary to a Rule in Law, *viz.* *Iniquum non est præsumentum*.

About 19 Years afterwards the like Case came in question again in the same Court, between (t) *Babington* and *Wood*, and the like Judgment was given, I suppose upon the Authority of the former Resolution; for Justice *Jones*, who reports the Case, tells us, that the Judges had seen that President, and thereupon they gave Judgment for the Bond, upon a Demurrer to the Declaration:

But the Bishop of *Worcester* will not allow One or Two solemn Decisions to pass for Law, but only such which are consonant to one another in a long Series and succession of Time, which did not happen between these Two Judgments; for the one was 8 *Jac.* and the other 5 *Car.* 1. and that between these Two Cases there was another of the same Nature, *Anno* 15 *Jac.* where there is a contrary Judgment, *viz.* That such a Bond was Simoni-
acal.

I confess there is such a Case reported by (u) Mr. *Attorney Noy*, not as a solemn Judgment, but only as an Opinion of the Court *Obiter* that it was Simony; for it appears by the very Book that it was not the Point in Question, and the Report it self is of no great Credit in the Law; for if the contrary Opinion, *Anno* 8 *Jac.* was Law, and so held by the unanimous Opinion of all the Judges of *England*, 'tis strange it should be alter'd by one Court, and but Seven Years afterwards; and that neither my Lord *Hobert*, who was then chief Justice, nor *Hutton*, one of the Judges of that Court, nor any other Reporter of that Time, should take any Notice of it besides Mr. *Noy*.

About 9 Years after that Case of *Babington* and *Wood*, the like Question was debated between * *Carey* and *Teo*, and that was upon a Demurrer to the Declaration, where the Action was brought upon such a Bond; and the Court held the Condition to be good, except it had been made for a *Simoniacal Purpose*, and if so, it ought to have been pleaded and † averred.

(t) Cro. Car. 184. Jones 220. (u) Noy 22. * 1 Rol. Abr. 417. † Moor 641.

So that the Law seeming to be so well settled in this Point, about 30 Years afterwards, when an Action of Debt was brought upon a Bond with such a Condition, between * *Watson and Baker*; the Defendant was advis'd not to demur to the Declaration, and insist that the Bond was Simoniacal, but he pleaded *In forma juris resignavit*, and that the Bishop accepted his Resignation: Now, I think, that notwithstanding the Opinion of that learned Bishop before-mention'd, all these Cases may pass for Law, because they are consonant to one another in a long Succession of Time.

We are told by the same (x) Bishop, that such a Bond hath been condemn'd in Equity, when an ill Use hath been made of it, and 'tis Reason it should; and I believe a Perpetual Jurisdiction was decreed against it, not because it was Simoniacal, but because the Patron made a bad Use of it to defraud the Parson of his Tythes; for it was agreed on all Sides, that the Bond it self was good, and so is this Condition following.

Whereas P. S. is within a short Time to be presented, instituted and inducted to the Church of H. in the County of S. if, therefore the said P. S. shall after his Admission, Institution, and Induction thereunto, at any Time, upon the Request of E. T. his Heirs, Executors, or Administrators, resign the said Church or Rectory of H. to the Ordinary of the Diocese of C. for the Time being, so that the said E. T. Patron of the said Church, or his Heirs, may present again to the same, discharg'd of all Incumbrances done or suffer'd by the said P. S. that then, &c.

Upon the whole Matter, these Bonds to resign generally upon Notice, have been held good both in Law and Equity; tho' we are told they are Simoniacal, because they are Bargains to obtain Presentations, and contrary to the Oath which Clergymen take, viz. *That they have not made any Simoniacal Contract or Promise whatsoever concerning the same.*

I shall not controvert this Matter, whether 'tis so or not, I have declar'd what the Law is in reference to such a Bond, and shall only add, that if 'tis put in Sute, and the Defendant pleads *Resignavit* on such a Day to the (y) Bishop, and that he accepted it: This shall be tried by the Country, and not by Certificate from the Bishop.

And here, by the way, 'tis to be observ'd, that a Benefice with Cure cannot be void by the sole Act of the Party, viz. By Resignation, without the Acceptance of the Bishop, because he is to give Notice to the Patron that he may present again; but if he refuses to accept it, then notwithstanding the Resignation the Incumbent continues so still.

* Sid. 317. Raim. 175. (x) 2 Chanc. Rep. 186. (y) Sid. 387.

Burial.

WE read in the Scriptures that || *Joseph* died, being 110 Years old, and that they embalm'd him and put him in a Coffin in *Egypt*, and that our * Saviour himself commended the Love of that Woman, who, out of a secret impulse on her Spirit that he was about to be crucified, power'd out of the Alabaster Box that precious Ointment on his Head, which from the circumstance of the Time, and nature of the Action, might be taken to be an embalming his Body.

'Tis probable, that from these Instances the Primitive Christians were so careful to embalm the Dead, which was us'd amongst them as a Memorial of the Resurrection to Glory; and tho' they always gave them a solemn Interment, yet it was never suffer'd to be in the Body of the Church, till some hundreds of Years after *Constantine* the Great, who earnestly desir'd to be buried in the Porch of that Church at *Constantinople*, which he had built in Memory of the Apostles, and his Son esteem'd it as a peculiar Honour done to his Father, when he got Leave for him to be buried there.

The *Romans* buried their Dead in the Highways, and therefore it was proper for them to engrave on their Tombs *Siste Viator*; but 'tis not so when the People were buried in Churches.

It is difficult to determine when this Usage was introduc'd here, therefore I shall not attempt it; but shew that the Freehold of the Church is in the Incumbent, and so is the Freehold of the Churchyard; and therefore none can be buried in the Church without Leave, but they may in the Churchyard, because 'tis the Burying-Place of the People: And tho' he gives Leave to bury in the Church, yet something may be due to the (r) Churchwardens, by Custom, for burying there, which Custom may be good, because the Parish is to be at the Charge to make up the Church-Floor; but then if the † Custom is denied, it must be tried at Law, and not in the Spiritual Court: And this was the Case of the Churchwardens of the Parish of *St. Stephen Walbrooke* in *London*, who libelled in the Spiritual Court for 1 l. 6 s. 8 d. for burying a Person in the body of that Church, suggesting their Title to have so much by Reason they repair'd the same.

But a Minister cannot refuse to bury the Dead, if he doth, having Notice, and the Corps being brought to the (a) Church, he shall be suspended from his Ministry for Three Months.

And after a Man is buried, if any one should dig up the Grave, and take away the Winding-Sheet 'tis || Felony, because the property of such Goods is still in the Owner; but something is

|| 50 Gen. ult. * 26 Mat. 12. (r) 2 Cro. 367. † 1 Vent. 274. (a) Cant. 68. || 12 Rep. 113.

due to the Minister for Burying: For in a National Synod held in the Reign of *H. 1.* in which Archbishop *Anselme* presided, it was decreed, that the Dead should not be carried out of their Parishes to be buried, lest the Parish-Priest should lose his Dues; which is the Reason, why the Clergy do now demand Fees for the Burial of those who die in their Parishes; tho' buried in other Places.

By the Statute 30 *Car. 2. cap. 3.* the Minister of every Parish is to keep a Register of the Burials, and of Affidavits of Persons buried in *Woolen*.

These Affidavits must be brought within Eight Days after the Burial; if not, the Minister must enter a *Memorandum* of the Default; and of the Time when he gave Notice thereof to the Parish Officers, which Notice must be given in Writing, under the Hand of the Minister; and this may be done at any Time; but the best way is soon after the Eight Days are expir'd; the Minister making Default in any of these Particulars, forfeits *5 l.*

The Affidavit must be taken by a Justice of the Peace, Mayor, or such like Officer, in the Parish where the Party was buried; and if there is none in that Parish, then by a Minister in the County, excepting in that Parish where the Corps was buried.

He who takes the Affidavit must set his Hand to it, and it must be attested by Two Witnesses, who were present at the taking it.

Canons:

Since the Church is a Society of Christians, and since every Society must have Authority to prescribe Rules and Laws for the government of their own Members, it must necessarily follow that the Church hath this Power; for otherwise there would be great Disorder amongst Christians.

This Power was exercis'd in the Church before the Empire became Christian; as appears by those ancient Canons made before that Time, and which are mention'd in the Writings of the Fathers, who liv'd in the Primitive Times:

This appears likewise by the Apostolical Canons, which are of great Antiquity, tho' not made by the Apostles themselves; as the Name imports; it appears likewise by other Councils, which were held in the Second Century, and by the Canons which were made in those Councils, which were not Directory alone, but were binding, and to be observ'd by the Clergy, under the penalty of Deprivation; and by the Laity, under the pain of Excommunication: And lastly, this appears by the constant practice and usage of the Church to this very Time; so that under this Title I shall mention,

1. Foreign Canons;
2. Such which have been receiv'd here;
3. The power of making new Canons.

As to the First, *Constantine* the Great, and the first Emperor, who gave Christians some respite from Persecution, caused general Councils, and national and provincial Synods to be assembled in his Dominions; where, amongst other Things, Rules were made for the Government of the Church, which were call'd Canons; the Substance whereof was at first collected out of the Scriptures, or the ancient Writings of the Fathers.

I shall not trouble the Reader with a long History of Provincial Constitutions, Synodals, Glossaries, Sentences of Popes, Summaries, Rescripts, and other Rhapsodies, with which the Canon Law hath by degrees been compil'd since the Days of that Emperor; 'tis sufficient to shew, that these Things were collected in three Volumes, by *Ivo* Bishop of *Chartres*, about the 14th Year of our (b) King *H. 1.* which are commonly call'd the *Decrees*; and these were corrected about 35 Years afterwards, by (c) *Gratian* a Benedictine Monk, and are now the most ancient Volumes of the Ecclesiastical Law.

These Decrees were not at first standing Rules to bind the People in general, but were only made for the government of the Clergy.

In a short Time afterwards Attempts were made by the Papal Authority to draw the Laity to obey these Decrees; and this was done, as some Authors tells us, *Timide & precario*, by proposing certain Rules to them for Fasting-Days, which were call'd by the mild and gentle Name of *Rogations*, and not *Canons*; and the Laity, by this Means, complied to obey them, not as impos'd on them strictly to be observ'd as Laws, but *Rogando*, their Compliance to them.

But all the Ecclesiastical Laws of *England* were not deriv'd from *Rome*; for tho' some foreign Canons were receiv'd here before the Conquest, yet the *Saxon* Kings, after they were converted from *Paganism*, did, by the Advice of their Clergy within this Realm, make several Ordinances for the government of the Church; and after the Conquest several Provincial Synods were held here, in which Constitutions were made, which are part of our Ecclesiastical Laws at this Day.

These Decrees, corrected by *Gratian*, were publish'd in *England* in the Reign of King *Stephen*; and the Reason of the Publication at that Time might be to decide the Quarrel between *Theobald*, Archbishop of *Canterbury*, and *Henry* Bishop of *Winson*, the King's Brother, who being made a *Legate*, the Archbishop look'd upon it as a Diminution of his Power, and an Encroachment upon that Privilege which he had as *Legatus natus*.

However, these *Decrees* were receiv'd by the Clergy of the *Western* Church, but never by those of the *East*, which is the Reason why their Priests might marry; which those of the *West* did not, because they were prohibited by these Decrees.

The next, in order of Time, were the *Decretals*, which are Canonical Epistles written by Popes alone, or assisted by some Cardinals, to determine any Controversy, and of those there are likewise Three Volumes.

These *Decretals* were Obligatory to all the Laity; as well as to the Clergy, not only in Spiritual Affairs, but in Civil; and in their Temporal Estates: As for Instance; That no Layman should present to a Benefice, nor marry within the prohibited Degrees; that Children born before Marriage should, by a Subsequent Marriage of their Parents, become Legitimate, and capable to inherit their Estates; and that all Clerks should be exempt from Secular Power, &c.

The First Volume of these *Decretals* was compil'd by *Raimundus Barcinus*, who was Chaplain to Pope Gregory IX. and publish'd by him about the 14th Year of our King * H. 3. this was appointed to be read in all Schools, and was to be taken for Law in all Ecclesiastical Courts.

About 60 Years afterwards, *Simon*, a Monk of *Walden*, began to read these Laws in the University of *Cambridge*, and the next Year in *Oxford*.

The Second Volume was collected and put into Method by Pope *Boniface VIII.* and publish'd about the 27th (d) Year of our King Ed. 1.

The Third Volume was collected by Pope *Clement V.* and publish'd in the Council of *Vienna*, and likewise here, (e) Anno 2 Ed. 2. and from him were call'd *Clementines*.

Each of these Volumes is divided into Five Books, containing almost the same Titles.

The First Book contains the Authority of Customs, Constitutions and Rescripts, the manner of confirming and consecrating Archbishops and Bishops; it treats of *Resignation* of Benefices; the Duties of Bishops to inspect the inferior Clergy, that Divine Service may be perform'd; the Times of ordering Persons to the Ministry, and how they are to be qualify'd; that Ministers Sons should not immediately succeed their Fathers in the same Benefice; that no Villains, Bigamists, or deform'd Persons be admitted to Holy Orders.

Then it sets forth the Antiquity and Office of Archdeacons, Vicars, Judges, Delegates, and many other Matters relating only to the Persons of such who are concern'd in Ecclesiastical Affairs.

The Second Book of the *Decretals* treats of Things and not of Persons. As for Instance: It treats of the manner of Citations, Libels, and Proceedings therein to Sentence, and something concerning Appeals.

The Third Book treats of the Lives and Behaviour of Clerks, who may be married, and in what Cases they may be *Non-resi-*

* Anno 1226. (d) Anno 1298. (e) Viz. 1308.

dent ; then it treats of Prebends and Dignities, which may be had by Institution from the Bishop ; of the Avoidance of Benefices, and Time of Lapse ; that Bishops shall not sell, &c. without the consent of the Chapter ; in what Cases the Goods of the Church may be sold, and in what not.

Then follows a Treatise of Last-Wills ; the Succession of Intestates ; a Discourse of Tythes, Burials, First-Fruits and Offerings ; of the right of Patronage ; of Synodals and Procurations ; of Consecration of Churches, Celebacy, Divine Service, Eucharist, Monks, Baptism, of Papists not baptiz'd, Fasting, Purification of Women, building and repairing Churches and Churchyards, Clerks not to meddle in Civil Affairs.

The Fourth Book treats of the difference between Espousals and Marriage ; of clandestine Marriages, and how to be made good ; of a Woman promising Two Men, whose Wife she shall be ; of a Man marrying a Woman with whom he had formerly committed Adultery ; if she did not know that he had a Wife then living, he cannot leave her after the Death of his first Wife ; whether leprous Men may marry or not ; of him who hath known his Wife's Sister, or his own Cousin German ; within what Degrees of Consanguinity or Affinity a Man may marry ; what Children are legitimate ; of Divorces, and of second Marriages.

The Fifth Book treats of criminal Matters, in which the *Spiritual Court* hath Jurisdiction ; as Simony, of Hereticks, Schismaticks, the Punishment of *Jews*, that they shall not take a Christian to be their Servant ; that if a Servant is a *Jew*, they shall sell him to a Christian for a Shilling.

That they may repair their old Synagogues, but not build new ones ; that they shall not open their Doors or Windows on *Good Friday* ; that their Wives shall not have Christian Nurfes, or be Nurfes to Christian Women ; that they wear distinct Apparel from Christians.

Then it treats of Apostates, *Anabaptists*, the Punishment of killing our own Children ; of Children expos'd to the Compassion of others ; of Murders and Manslaughter ; of Whoredom, Adultery, Rape, Thieves, Robbers, Usury, Deceit, Falshood, Sorcery, Collusion, Cosenage, Children not to be punish'd as Men ; of Clerks who are Hunters and Hawkers, &c.

These *Decretals* were never receiv'd here, or any where else, but only in the Pope's Dominions, which are therefore call'd by the Canonists, *Patriâ Obedientia*, as particularly the Canon concerning the Investiture of Bishops, by a Lay Hand.

John Andrews, a famous Canonist in the Fourteenth Century, wrote a Commentary on these *Decretals*, which he entitl'd *Novella*, from a very beautiful Daughter he had of that Name, whom he bred a Scholar ; and the Father being a Professor of the Law at *Bologna*, had instructed his Daughter so well in it, that she assisted him in reading Lectures to his Scholars, and therefore

therefore to perpetuate her Memory, he gave that Book the Title of *Novella* from her Name.

About the 10th Year of the said King *Ed. 2. Pope John XXII.* publish'd his *Extravagants*.

Now as to us here in *England*, even at that Time when the Papal Authority was at the highest, none of these foreign *Canons*, or any new *Canons*, made at any national or provincial Synod here, had any manner of Force, if they were against the Prerogative of the King, or the Laws of the Land.

'Tis true, every Christian Nation where the Pope's Supremacy was acknowledg'd, sent some Bishops, Abbots, or Priors, to those foreign Councils, and generally Four were sent out of *England*; and it was by that Means, together with the Allowance of the Civil Power, that some Canons made there were receiv'd here, but such which were against the Laws were totally rejected: I shall instance in a few, and so proceed.

In the (f) *Extravagants of Pope John*, there is a Canon that a Bishop shall have the Tythes of all such Land within his Diocess, which is not appropriated to any Parish.

Anno 7. Ed. 3. a Question arising, who should have the Tythes of such parts of *Forest Lands*, which were not within the Bounds of any Particular; Sir *William Herse*, who was then Chief Justice of the *Common-Pleas* held, that the Bishop of the Diocess should have them, and probably he grounded his Opinion upon this Canon; but my (g) Lord *Coke* tells us, that Canon was never receiv'd here; for it was the Prerogative of the King to grant such Tythes to whom he would; and accordingly, *Anno 22. Ed. 3.* the Grantee of the King brought an Action against some Ecclesiasticks, concerning Tythes arising in *Rockingham Forest*; and then *Thorp*, Chief Justice of the same Court, held the Right to be in the King, and by consequence in his Grantee.

But *Simon Islip*, who was then Archbishop of *Canterbury*, being a Man of an ambitious Temper, and not contented with that Grant which he had got from the Pope, to receive a Subsidy of all the Clergy of the Diocess; for the better Support of his Archiepiscopal Dignity, petition'd the King in Council, that he might have those Tythes; and because the Matter was not then determin'd by the (b) Council, the Chief Justice gave no Judgment in the Case depending before him.

Another Instance is, that by the *Canon Law* Parsons were to repair the Parish Churches; but this being contrary to the (i) Custom of the Realm, that Canon was never receiv'd here, for the Parishioners alway repair it.

The Canon in the *Decretals*, that Children Born before Marriage should be Legitimate, if the Parents afterwards mar-

(f) Tit. de decimis. cap. 13. (g) 2 Inst. 647. (b) 22 Affr Plito, 75, (i) 2 Inst, 653.

ried was not receiv'd here: 'Tis true, some Attempts were made in Parliament to establish this into a Law, and particularly by the (k) Parliament of *Merton*, when the Bishops interceded with the Temporal Lords for that Purpose, but answered *Una Voce*, that they would not change the Laws of the Land; and (l) *Glanvil* tells us, what was then attempted was *Contra jus & consuetudinem Regni*.

By a Canon made at a Council held at *Lyons*, a Man twice married, or who had married a Widow, was not to have the benefit of his Clergy upon a Conviction for Felony. The Bishops in those Days interpreted this Canon to extend only to such who were twice married after that Council, and therefore demanded those Clerks who were twice married before; but because the Judges of the Common Law had a Right to determine the allowance of this Privilege, and because by the disallowance the Life of a Man was to be taken away, therefore they would not allow this Canon till it was declared in Parliament, that as well those who were married twice before, as those who were twice married after; the Council should not be deliver'd to the Prelates, but should be depriv'd of the benefit of their Clergy:

But this is now taken away by the Statute 1 *Ed. 6. cap. 12.*

So the Canons for exempting the (m) Clergy from the Temporal Jurisdiction were never absolutely receiv'd here; 'tis true, the Clergy had many Privileges, but were never totally exempted from Trials in the King's Court.

So the Canons concerning Appeals, Provisors, Dispensations, &c. were never receiv'd here by the general Consent of the People; for sometimes they were oppos'd, and at other Times obey'd, as the Authority of the Pope prevail'd here.

That Canon in the *Decretals*, prohibiting the Son of a Clergyman immediately to succeed his Father in the same Benefice, without a Dispensation from the Pope, never prevail'd here: This was the Opinion of Justice *Doderidge*, in the Case of (n) *Stokes* and *Sykes*, where the Son was presented by a Lay Patron to the Benefice, after his Father; the Bishop refus'd to admit him, by Reason of this Canon; therefore the Patron presented *Sykes*, who was admitted, instituted and inducted; and the Bishop and Incumbent were su'd in the *Delegates*, but they obtain'd a Prohibition, and the Book makes a *Quare* what Remedy for the first Presentee.

In many other Cases, *Foreign Canons* were never receiv'd here. As that concerning the Marrying the Woman with whom he had committed Adultery; the prohibiting any Sale of Advowsons; the revocation of a Presentation by a Spiritual Patron, and several others. And the Canon Law it self was of so little esteem amongst the Civilians of that Age, that it was call'd by them *Crassa Aequitas*.

(k) Cap. 9. (l) Lib. 7. cap. 15. (m) Poph. 157. (n) Latch. 191. But

But some of these *Foreign Canons* were receiv'd here, and obtain'd the force of Laws, by the general Approbation of the King and People (tho' it may be difficult to know what these Canons are) and it was upon this Pretence that the Pope claimed an Ecclesiastical Jurisdiction here, independent of the King, and sent his Legates hither, with Commissions, to determine Causes according to those Canons, which were now compil'd into several Volumes, and call'd *Jus Canonicum*; and these were not only enjoin'd to be obey'd as Laws, but publickly to be read and expounded in all Schools and Universities, as the Civil Law was read and expounded there; and this was to be under pain of Excommunication to those who neglected.

This created Quarrels between Kings, and several Archbishops and other Prelates, who adhered to those Papal Usurpations. For such *Foreign Canons* which were receiv'd here, never had any force from any Papal Legatine, or Provincial Constitutions, but from the acceptance and usage of the Church here: For the Bishops who were sent from hence to assist in *Foreign Councils*, consented to the Canons made there; yet that did not (o) bind till allow'd by the King and People, as I have already observ'd.

However, when a Canon is thus receiv'd upon an ancient Practice and general consent of the People, in such Case 'tis part of the Law of the Land.

Besides these *Foreign Canons*, there were several Laws and Constitutions made here, for the Government of the Church, all which are now in force; but had not been so without the Assent and Confirmation of the Kings of *England*. For even from *William* the First, to the time of the Reformation, no Canons or Constitutions made in any *Synods* here were suffer'd to be executed if they had not the Royal Assent. And this was the common Usage and Practice here, when the Papal Usurpation was most exalted; for if at any Time the Ecclesiastical Courts did by their Sentences endeavour to enforce Obedience to such Canons, the Courts, at Common Law, upon Complaint made, would grant Prohibitions.

So that the Statute of Submission, which was afterwards made *Anno 25 H. 8.* seems to be declarative of the Common Law, that the Clergy could not *De jure*, and by their own Authority, without the King's Assent, enact or execute any Canons.

These Canons were all collected and explain'd by *Lyndwood*, Dean of the *Arches*, in the Reign of *H. 6.* and by him reduc'd under this Method.

1. The Canons of *Stephen Langton*, Cardinal and Archbishop of *Canterbury*, made at a Council held at *Oxford Anno 6. H. 3.*
2. The Canons of Cardinal *Otto*, the Pope's Legate, who held a general Council in *St. Paul's Church, Anno 21 H. 3.*

(o) Latch, 234, Palm, 458. Jones 160,

K 4

which

which from him were call'd the Constitutions of *Otto*; upon which *John de Athon*, one of the Canons of *Lincoln*, did write a Comment.

3. The Canons of *Boniface* of *Savoy*, Archbishop of *Canterbury*, Anno 45 H. 3. which were all Usurpations upon the Common Law, as concerning the Boundaries of Parishes; the Right of Patronage, and against Trials of the Right of Tythes in the King's Courts, against Writs of Prohibition, &c.

And tho' he threatned the (p) Judges with Excommunication (of which some were then Clergymen) if they disobey'd the Canons, yet they proceeded in these Matters, according to the Laws of the Realm; and kept the Ecclesiastical Courts within their proper Jurisdiction.

But this occasion'd a Variance between the Spiritual and Temporal Lords, and thereupon the Clergy, 31 H. 3. exhibited several Articles of their Grievances to the Parliament, which they call'd *Articuli Cleri*; the Articles themselves are lost, but some of the Answers to them are extant; by which it appears that none of those Canons made by *Boniface* were confirm'd.

4. The Canons of Cardinal *Ottobon*, the Pope's Legate, who held a Synod at *St. Paul's*, Anno 53 H. 3. in which he confirm'd those Canons made by his Predecessor *Otto*, and publish'd some new ones; and by his Legatine Authority commanded that they should be obey'd: Upon these Canons, likewise, the said *John de Athon* wrote another Comment.

5. The Canons of Archbishop *Peckam*, made at a Synod held at *Reading*, Anno 1279. 7 Edw. 1.

6. The Canons of the same Archbishop, made at a Synod held at *Lambeth*, Two Years afterwards.

7. The Canons of Archbishop *Winchelsea*, made Anno 34 Ed. 1.

8. The Canons of Archbishop *Reynolds*, at a Synod held at *Oxford*, Anno 1322. 16 Edw. 2.

9. The Canons of *Symon Mepham*, Archbishop of *Canterbury*, made Anno 1328. 3 Ed. 3.

10. Of Archbishop *Stratford*.

11. Of Archbishop *Symon Islip*, made 1362, 37 Ed. 3.

12. Of *Symon Sudbury* Archbishop of *Canterbury*, made Anno 1378, 2 Rich. 2.

13. Of Archbishop *Arundel*, made at a Synod at *Oxford* Anno 1403. 10 H. 4.

14. Of Archbishop *Chicheley*, Anno 1415, 3 H. 5.

15. Of *Edmond* and *Richard*, Archbishops of *Canterbury*, who immediately succeeded the aforesaid *Stephen Langton*.

But these Canons being made in times of Papal Authority here, were soon after the Reformation intended likewise to be

reform'd by Archbishop *Cranmer*, and some other Commissioners appointed for that Purpose, by *H. 8.* and *Ed. 6.* The Work was finish'd, but the King dying before it was confirm'd, it so remains to this Day.

The Book is call'd *Reformatio Legum Ecclesiasticarum ex Auctoritate Regis*, *H. 8.* *inchoata* & per *Ed. 6.* *profecta*; it was put into elegant *Latin* by Dr. *Haddon*, who was then University Orator of *Cambridge*, assisted by Sir *John Cheek*, who was Tutor to *Ed. 6.*

The next Thing to be consider'd, is, the Authority of making Canons at this Day; and this is grounded upon the Statute 25 *H. 8.* commonly call'd the (9) Act of Submission of the Clergy, by which they acknowledg'd that the Convocation had been always assembled by the King's Writ; and they promis'd in *Verbo Sacerdotis*, not to attempt, claim, or put in use, or enact, promulge, or execute any new Canons in Convocation, without the King's Assent or License.

Then follows this enacting Clause, viz. That they shall not attempt, alledge or claim, or put in use any Constitutions or Canons without the King's Assent: And so far this Act is declarative of what the Law was before; for Archbishop *Hubert* holding a Provincial Council in the Reign of *R--s*, was prohibited to proceed in it by *Jeffery Fitzpeter*, who was then Chief Justice of England, because he had not the King's Leave.

But the Clause beforemention'd extends to such Canons which were then made both *Beyond-Sea* and *here*, viz. to *Foreign Canons*, that they should not be executed here till receiv'd by the King and People as the Laws of the Land; and to Canons made here which were contrary to the Prerogative, or to the Laws and Customs of the Realm.

This appears by the Proviso, That no Canons shall be made, or put in Execution within this Realm, which shall be contrary to the Prerogative or Laws.

But the next are negative Words, which relate wholly to making new Canons, viz. nor make, promulge, or execute any such Canons without the King's Assent.

These Words limit the Clergy in point of Jurisdiction, viz. That they shall not make any new Canons, but in Convocation; and they cannot meet there without the King's Writ; and when they are met and make new Canons, they cannot put them in Execution without a Confirmation under the Great Seal.

Some Years after this Statute the Clergy proceeded to Act in Convocation, without any Commission from *H. 8.* But the Canons which they made were confirm'd by that King, and some of his Successors, as particularly the Injunctions publish'd *Anno 28 H. 8.* for the abolishing superstitious Holy-days; those for Preaching against the use of Images, Relicks and Pilgrima-

ges; those for repeating the Creed, the Lord's Prayer and Ten Commandments in the *English* Tongue.

Sometimes that King proceeded by the advice of his Bishops out of Convocation, as about the Injunctions publish'd *Anno* 30 *H.* 8. for admitting none to Preach but such who were licens'd: Those for keeping a Register of Births, Weddings and Burials; for the abolishing the Anniversary of *Thomas Becket*.

The like may be said of those Injunctions publish'd *Anno* 2 *Ed.* 6. prohibiting carrying Candles on *Candlemas-day*, and Alhes in *Lent*, and Palmes on *Palm-Sunday*.

Queen *Elizabeth*, in the Second Year of her Reign, publish'd several Injunctions by the Advice of her Bishops. And Two Years afterwards she publish'd a Book of Orders without the Confirmation of her Parliament.

'Tis true, when she was settled in her Government, all Church Affairs were debated in Convocations authoriz'd by her Power. And several Canons were made in her Reign, and confirm'd by her Letters Patents; but because she did not bind her Heirs and Successors to the Observance of them, those Canons expir'd with that Queen.

The old Canons were still in force in all those Reigns above-mention'd. But || *Anno* 1 *Jac.* the Clergy being lawfully assembled in Convocation, the King gave them Leave by his Letters Patents to *Treat, Consult and Agree* on Canons, which they did, and presented them to him, who gave his Royal Assent; and by other Letters Patents did for himself, his Heirs and Successors, ratify and confirm the same. These Canons thus establish'd were not then invented, but were collected out of such Ordinances which lay dispers'd in several Injunctions publish'd in those former Reigns, and out of such Canons and other Religious Customs which were made and us'd in those Days; and being thus confirm'd are the Laws of the Land, and by the same Authority as any other Part of the (*r*) Law; for being authoriz'd by the King's Commission according to the form of the Statute 25 *H.* 8. they are warranted by Act of Parliament; and such Canons so made and confirm'd, shall bind in (*f*) Ecclesiastical Matters as much as any Statute.

'Tis true, an Act of Parliament may abrogate any Canon, unless it consists in enjoining some Moral Duty; but a Canon not confirm'd by an (*t*) Act of Parliament cannot alter any other Law. 'Tis agreed that Canons made in Convocation, and confirm'd by Letters Patents, bind in all Ecclesiastical Affairs; that no Canons in *England* are absolutely confirm'd by Parliament, yet they are part of the Laws of the Land, for the Government of the Church, and in such Case bind the Laity as well as the Clergy; that tho' such Canons cannot alter the Common Law,

|| *Anno* 1603. (*r*) *Vaugh.* 327. (*f*) *Moor* 783. (*t*) 2 *Vent.*

Statutes, or Queen's Prerogative, yet they may alter other Canons, otherwise the Convocation could not make new Canons. All that is requir'd in making such Canons, is, that the Clergy confine themselves to Church Affairs; and not to meddle with such Things which are settled by the Common Law.

But tho' no Canons are absolutely confirm'd by Act of Parliament, yet those which are neither contrary to the Laws of the Land, or to the King's Prerogative, and which are confirm'd by him, are made good and allow'd to be so by the Statute 25 H. 8. Therefore where a Schoolmaster was su'd in the Ecclesiastical Court for keeping School without leave of the Ordinary, contrary to the Canon, and upon a Motion for a Prohibition it was deny'd; for tho' the Act of Uniformity gives a Penalty of 5 l. in such Case, to be recover'd by Bill, &c. yet that doth not take away the Ecclesiastical Jurisdiction, where they proceed on the Canons, which are neither contrary to the Law, nor encroach on the King's Prerogative, 2 Lev. 222.

Some of those Canons made in 1603, are now obsolete, and do not concern either the Government of the Church, or the right of any particular Person; as for Instance, the 74th Canon, which requires that the beneficed Clergy shall wear *Gowns with standing Collars, and Square Caps*; and when they travel they shall wear *Cloaks with Sleeves*, but without long Buttons.

That a Parish Clerk shall be a Man who can Write and Read, and be competently skill'd in Singing.

These Things are seldom or never made any Articles of a Visitation, for the Habit is totally disus'd, tho' the Reason still continues, viz. That there should be a Decency amongst Clergymen, to procure their outward Reverence; but for Parish Clerks, 'tis generally known, those in the Country cannot write, and some can scarce read or sing.

So that we see Custom prevails against the standing Canons of the Church, and 'tis reasonable it should be so, for otherwise we must not Kneel at Prayers between *Easter and Whitsunside*, which was anciently prohibited: And the general disuse of a Canon, not in contempt to Authority, but by a tacite Connivance of our Governors, and without any Admonition to obey it, may in some Measure abate its Force.

Now, as to the Matter of those Canons, that which tends to promote the Honour of GOD and Service of Religion, must necessarily bind our (u) Consciences. And such are those which enjoin the sober Conversation of Ministers, prohibiting their frequenting Taverns, playing at Dice, Cards or Tables: This was anciently prohibited by the Apostolical Canons, and in the old Articles of Visitation here, and in several Diocesan Synods.

So are those Canons which relate to the Duties of Ministers in Praying, Preaching, Administring the Sacraments, and Visiting the Sick; all these are Obligatory in point of Conscience.

I shall conclude this Article with the Canons made in 1640, tho' they are not in force, and the Reason is as followeth:

In the Year 1639. a Parliamentary Writ was directed to the Bishops, to summon their Clergy to Parliament *Ad consensendum, &c.* and the Convocation Writ to the Archbishops *Ad tractand. & consensuend.*

The Parliament met on the 13th of April 1640, and was dissolv'd on the 15th of May following.

Now, tho' the Convocation sitting by Vertue of the first Writ directed to the Bishops, must fall upon the dissolution of that Parliament, yet the Lawyers held that they might still continue sitting by Vertue of the King's Writ to the Archbishops; for being call'd by that Writ, under the Great Seal, they might sit till dissolv'd by the like Authority.

But this being a nice Point, a Commission was granted about a Week after the dissolution of the Parliament, for the Convocation to sit; which Commission the King sent to them by Sir Harry Vane, his Principal Secretary of State, and by Vertue thereof they were turn'd into a Provincial Synod; but the chief of the Clergy then assembl'd, desir'd the King to consult all the Judges of England in this Matter, which was done; and upon debating it in the Presence of his Council, they asserted under their Hands, the Power of the Convocation in making Canons: Thereupon they sate a whole Month, and compos'd a Book of Canons, which were approv'd by the King, by the Advice of his Privy Council; and confirm'd under the Broad Seal.

They likewise gave Subsidies to carry on the War against the Scots, which was call'd *Bellum Episcopale*, and they enjoin'd the taking an Oath, which the noble + Historian tells us they could not do; and that they did many other Things which might have been question'd in the best of Times, and therefore were sure to be condemn'd in the worst.

The Objection against the Canons was, That they were not made pursuant to the Statute 25 H. 8. beforemention'd, because they were made in a Convocation, sitting by the King's Writ to the Archbishops, *after the Parliament was dissolv'd*, tho' there is nothing in the Statute which relates to their sitting *in time of Parliament only*; yet that being the Proper Time for the Convocation to sit, the making these Canons at any other Time was imputed to the Bishops as a Fault, and to move the People against their whole Order; which was afterwards abrogated in those Tumultuous Times which follow'd.

Therefore, after the Restoration, &c. an Act was made to restore them likewise to their Ordinary Jurisdiction, in which Act

there was a Proviso that it should not confirm those Canons made in the (x) Year 1640, which Clause or Proviso makes the King's Confirmation void. And thus the Ecclesiastical Laws were left as they were before the Year 1639.

From hence we may conclude, that Canons should be made in a Convocation, the Parliament setting; that being so made they are to be confirm'd by the Queen; and that without such Confirmation they do not bind the Laity, much less any Order or Rule made by a Bishop alone, where there is neither Custom or Canon for it. As for Instance: The (y) Ordinary commanded that a Woman coming to be church'd should be in a Veil, and kneel at her Entrance into the Church, and pray towards the East: This was held to be void, because the Bishop had not Power to impose such new Ceremonies, where there was neither Custom or Canon to warrant them.

Cathedrals; See Churches.

Cathedraticum.

THIS is a Tribute due to the Bishop from his Inferior Clergy, viz. *A qualibet Ecclesia*, at the time of his Visitation, or as (z) Sir Henry Spelman tells us, *Per Dioecesim Ambulans*, that is in his Visitation by Parishes.

The Sum at first was uncertain, but at the second Council held at *Braga in Portugal*, it was limited to Two Shillings; and by the Seventh Council of *Toledo in Spain*, it was decreed, that he should not presume to take any more.

This Payment began when the Revenues of the Church were no longer receiv'd by the Bishop; for in the first Ages of Christianity he receiv'd all, and distributed Part to his Clergy for their Maintenance; but when once the Clergy had a fix'd and settl'd Maintenance, then they began to claim this Duty in nature of a Rent paid by the Tenant to his Lord, of whom he holds, *In Argumentum Subjectionis*, and it was call'd *Cathedraticum in honorem Cathedrae*, and 'tis now become *Onus Ecclesiasticum*; but 'tis not by Innovation, for 'tis settl'd by Prescription.

Caveat.

'TIS usual where the Right of Patronage is likely to be contested, for a *Caveat* to be entered with the Bishop's Register by one of the Contending Parties, thus:

(x) 13 Car. 2. cap. 12. (y) 2 Rol. Abr. 225. (z) Spelm. Gloss. in verbo.

Caveat Episcopus C. ne quis admittatur ad Ecclesiam de H. nisi convocatus, R. B. Sc.

The *Canonists* allow this to be done in the *Life-time* of the Incumbent, *Quia veretur damnum futurum*; and that if another is instituted after such a *Caveat* enter'd, without Notice given to him who enter'd it, the Institution is void.

But 'tis otherwise at (a) Common Law, for a *Caveat* is only for the Benefit of the Bishop, and to prevent his being found a Disturber; it doth not preserve *Jus Illasum*, so as to make all Subsequent Proceedings void, because it doth not come from any Superior; 'tis the same in the Spiritual Court as 'tis in the Temporal; that is, 'tis only a Cautionary Act, for the better Information of the Judges.

As for Instance: A (b) *Caveat* enter'd in the Court of Chancery, that a Patent should not pass, or in the Queen's Silver-Office, that a Fine should not pass; yet if a Patent, or Fine, passeth after such *Caveat*, 'tis not void; 'tis true, *Fieri non debet, sed factum valet*.

The Law is the same in the Spiritual Court; for if a *Caveat* is put in against an Administration, yet if 'tis granted afterwards, 'tis not void.

So where a Dispute was between Two Persons, who should be rightful Patron to a Church, one enter'd a *Caveat* with the (c) Bishop in the *Life-time* of the Incumbent, but he was very Ill, and died the next Day; notwithstanding this *Caveat* the Bishop admitted and instituted the Presentee of the other, but he was not inducted; it was adjudg'd that the first Institution was not void, for if it should, it would be in the Power of the Bishop to defeat any Patron of his Presentation. As for Instance; When a Church is void he may cause any one to enter a *Caveat*, and then grant Institution to the Person presented, and avoid it again after Six Months, by Virtue of the *Caveat*, and so Present by Lapse.

'Tis reasonable therefore, that the (d) Church should be full upon an Admission and Institution after a *Caveat*; and when Suits have been brought in the *Spiritual Court* to avoid such Institutions, the Courts of *Common Law* have granted Prohibitions; for 'tis no more than a Breach of a Canon, and doth not make the Institution void; but it seems reasonable, that in such Case the Bishop should be punish'd as a Disturber, especially if he who enter'd the *Caveat* should happen to have a better Title than the other; or if not, that the Bishop should be still punish'd in the *Spiritual Court*, for a Breach of the Canon.

Cautione Admittenda; See Excommunication.

(a) Pop. 133. (b) Sid. 372. (c) 1 Rol. Rep. 192. 227. 2 Rol. Rep. 7. 2 Cro. 460. 2 Rol. Abr. 220. (d) 2 Rol. Abr. 361.

Cessions

Cession.

THIS is when the Incumbent of any Living is promoted to a *Bishoprick*, the Church in such case is void by *Cession*. It hath been *Vexata Quæstio*, whether the Queen or Patron ought to Present upon such Promotion.

'Tis true, this Point is not determined either in the Year-Books, or any other ancient Books of the Law; and the Reason may be, because the Kings of *England* in those Days, seldom made use of this Prerogative; and if ever they claimed it, 'twas very tenderly; for the Pope challenged the Disposal of all Preferments in the Church.

This occasioned the making the (a) Statute against Provisors, to prevent his Collations to Benefices in *England*, and to give them to the King as Patron-Paramount.

But notwithstanding this Law, even that King and his Successors did suffer the Pope still to collate upon *Promotions*, and seldom or never disputed it with him, but a Method was found out to save the Prerogative; for when a Parson was made a Bishop, it was usual to grant the Temporalties to him before Consecration; and this prevented the King's Right of (b) Patronage, which Right he had whilst the Temporalties were in his Hand; but that was not by Virtue of his Prerogative, for during that Time he had a Temporary Right to present as lawful Patron: And it was clear, that the Benefice which the Bishop had, as Parson, was not void till he was consecrated.

In 11 H. 4. 7, 37. which was about 60 Years after the afore-said Statute, it was agreed that the Patron should present upon a *Promotion*. *Hill*, one of the Judges of the *Common-Pleas* distinguished, that where the King was Patron, he should Present; but not to a Benefice in the Patronage of another.

And there is no other solemn Judgment after the making that Statute of any Presentation by the Patron, for the Pope was still allowed to collate upon *Promotions* till the 25 H. 8.

It must be admitted, that this is a Prerogative not mentioned in the Statute *de Prærogativa Regis*, nor by *Stamford* himself, who wrote a Book of the Prerogatives; but that is no Argument against it, for he neither mentions any Prerogative to Present by Lapse, and that was never yet denied, because the King is Supreme Head of the Church.

My Lord Chief Justice (c) *Dyer*, Anno 6 Eliz. was of Opinion, that the Queen had not such a Prerogative; and he tells us, *Sic alii socii mei sentiebant*, but that was but the Opinion of a single Judge *Obiter*, it did not relate to the Case then in question, for that was a *Quare impedit* brought by Sir Henry *Sydney* against the Bishop of *Gloucester*, and one *Reeve*, who succeeded *Parkhurst*, the last Incumbent, who was made Bishop of

(a) Anno 35 Ed. 3. (b) 41 Ed. 3. 5. (c) *Dyer* 228.

Normich; and the Issue being joined upon his *Resignation*, the Question was, Whether that should be tried by the Country? And it was adjudged that it should, because the Avoidance is a notorious Act, and the Resignation is only Evidence of it.

But even at that time the Practice was contrary to my Lord *Dyer's* Opinion, for in that Queen's Reign Mr. *Noy* mentions no less than 18 Presidents in the Space of 40 Years; being from the 21st Year of her Reign, to the 14th of King *James*, where the Queen and that King presented upon Promotions: And this the Bishop of *Worcester* supposes he might collect out of several Registers of Bishops, where Institutions are recorded, and where it may be seen who were presented.

About the latter end of that (d) Queen's Reign, the Point came to be solemnly debated in the Court of *Common-Pleas*, upon the Promotion of one *Davis*, who was Vicar of *Burnham*, to the Bishoprick of *St. Asaph*.

Serjeant *Moor*, who reports the Case, tells us, that the Judges would be very well advised before they gave any Resolution contrary to an ancient Prerogative; and at last, upon view of many Presidents, gave Judgment for the Queen against the Patron.

Justice *Crook*, who reports the same Case, gives the Reason for that Judgment, viz. because the Queen having advanced the Incumbent to the Dignity of a Bishop, 'tis by her means that the Living is void, and therefore she ought to Present.

The same Reason is given by the Canonists; they say that the Right of Patronage extends only to an Avoidance upon Death, or Resignation, but not upon a Promotion, because the Vacancy in such Case is made by the Act of a Superior; and the Patron hath no reason to complain, when the Queen so far approves his Choice, as to advance his Presentee to a Bishoprick.

It may be resembled to a known Case, at *Common Law*, viz. If an Estate is given for another Man's Life, the Donor can have no Title while that Man is living, tho' the Right is transferred by the Donee, from himself to another.

In the same Year, and in the same Court, (e) Justice *Gawdy* doubting whether the Queen had such a Prerogative, my Lord *Coke* told him, that he could produce the Resolution of all the Judges for it; and the Lord Chief Justice *Popham*, held it to be the common Experience at that Time.

About three Years afterwards the Incumbent being made a Bishop in *Ireland*, the Judges of the same Court declared that the Queen was to Present by her Prerogative.

Anno 22 Jac. the (f) Question was debated again; and then Justice *Hutton* was against the Prerogative, viz. that the King

(d) Wentworth vers. Wright. Cro. Eliz. 526. Moor 399. Owen 144. (e) Cro. Eliz. 790. (f) Woodley vers. Bp *Exon*, and *Manwaring*.

could not Present except he was *Patron*: Probably he might ground his Opinion upon that of Justice *Hill*, before-mention'd, and upon the Silence of the Year-Books, where no such Prerogative is to be found; but that cannot be an Argument against it, for tho' the King might have such a Prerogative, yet he might suffer the Patron to Present upon particular Reasons: And 'tis generally known, that in those Days the Pope collated upon *Promotions*; and there cannot be one Instance produced, where this Right was contested between the King and the Patron, and Judgment given against the King; even in the Times of Popery, but rather the contrary; for my Lord (g) *Broke*, in his Abridgment, saith, That *Anno 5 Maria*, the Bishop of *Ely* told him, that he had seen a *Presentation* made by *Ed. 3.* to a Benefice void by *Promotion*, and that *Ratione Prærogativæ suæ*, tho' the *Patronage* was in another.

The like Case was debated again upon a new Act of Parliament, by which the Parish of *St. James*, within the Liberty of *Westminster*, was erected out of the Parish of *St. Martin*; and *Dr. Tennison*, the first Rector thereof, and he being made Bishop of *Lincoln*, it was adjudged that the King and Queen should Present; and that they were not barred of this Prerogative, by a Dispensation to hold the said Rectory in *Commendam*, for that transferred no manner of Right to the Incumbent, but only continued him Rector, and so suspended the Avoidance for a Time; which otherwise would have been the Consequence of his Promotion; and if he had died during this Dispensation, the Church had been void by his Death, and then the King could not Present by his Prerogative; for that works only upon the next Avoidance, by the Promotion; tho' suspended for a Time, and not by Death.

Upon the whole Matter, the Popes enjoyed this Privilege before *H. 8.* as Heads of the Church; and since the Supremacy is vested in the Crown, 'tis reasonable the Queen should enjoy the like Privilege: Her Predecessors have been in Possession of it ever since the 21st *Eliz.* for by Law She is the Supreme *Patron* over all the Livings in her Dominions; for otherwise, how could She have any Title to present by Lapse?

'Tis true, the *Patron* hath a Right, which is both just and legal, but 'tis not absolute; for the original Right of *Patronage* was by Vertue of the Land which he had of the King, and on which the Church was built, which might escheat to the King as Lord of the Fee: So that what Right the *Patron* hath, is only fiduciary; 'tis a Trust reposed in him to nominate a fit Person upon a Vacancy, and 'tis limited to six Months; if he doth not execute his Trust in that Time, then it devolves to the Ordinary, and so to the Queen, but not in Right of the *Patron*, for that is extinguished *pro hac vice*: But there is nothing in Law

to prevent the King from presenting in an extraordinary Case; 'tis a Prerogative which may consist with the Liberty of the Subject, who, upon the King's Presentation upon a Promotion, may be as near to his Right to Present upon a Vacancy as before, because 'tis but an Exchange of one Life to another.

Chancel.

THIS is a Place separated from the Body of the Church, by Lattices or Windows of Wood, which in *Latin* are called *Cancelli*; and from thence 'tis called a *Chancel*.

'Tis the Freehold of the (b) Rector, and part of his Glebe, and therefore he ought to repair it; but if the Rectory is impropriate, then the Impropiator must do it: And this he is enjoined to do, not only by the Common Law, but by the Canons of the Church; for in the Gloss upon the Constitution of Cardinal *Ostibon*, 'tis said, That *Chancels* must be repair'd by those who are thereunto oblig'd; which Words must refer to the common Custom of (i) *England*, by which Rectors are obliged to repair the *Chancels*: And if Prohibitions should be granted in such Cases, Consultations are usually awarded, of which there are Forms in the * Register.

It hath been a Question, If an Impropiator should neglect to repair the *Chancel*, how he may be compell'd to do it? And 'tis held, that the Impropiate-Rectory cannot be sequestred by the *Spiritual Court*; because, by the Statute 31 *H.* 8. the Profits of such a Rectory are made a Lay-Fee, and so not subject to the Jurisdiction of that Court, so that the Remedy must be against the Person himself, as against a Lay-man, for not repairing the Church.

Jeboash, one of the good Kings of *Judah*, took a more effectual Remedy for the Repairs of the Temple in his Reign; for having appointed the Priests to take the Money arising out of Things brought in to the Church, and dedicated to the Repairs thereof, and they having apply'd it to another use for 23 Years together, he commanded that they should receive no more Money of the People, but appointed his Secretary to do it, who actually paid the Workmen who wrought in the House of the (k) Lord.

But notwithstanding 'tis the common Custom for the Rectors to repair, I do not deny, but in some particular Places there may be an ancient Custom to the contrary; as for instance, there is such a Custom in *London* for the Parishioners, and not the Rector, to repair the *Chancels*.

So likewise by (l) Prescription; a particular Man's Estate may be liable to repair it, which is a better Exemption to the

(b) 2 Rol. Rep. 211. (i) 2 Inst. 480. * 48. (k) 2 Kings xii. (l) 2 Vent. 35. 2 Vent. 239. 1 Mod. 257.

Rector than that place of Scripture which he alleg'd to prove that his Parishioners ought to pave the *Chancel*, *vizi Pavant illi & non paveam ego.*

In (*m*) *Hawkins's Case* a Custom was form'd for the Parishioners of *St. Edmond*, on the Bridge in *Exeter*, to repair the *Chancel*; but the Custom being laid for the Owners and Occupiers of ancient *Houses* there to repair, &c. and the Defendant being rated for *Mills* and *Racks* in the Parish, that varied from the Custom, and so it was void.

As to Seats in the *Chancel*, it hath been a Question, Whether the Ordinary may place any Person there? The Objections against it are;

1. Because 'tis the Freehold of the Rector.
2. Because he is to repair it.

But these are not sufficient Reasons to divest the Ordinary of that Jurisdiction; for the Freehold of the Church is in the Parson; and yet the Bishop hath a Power of placing Persons there.

Then as to repairing, 'tis no more than what of common Right he ought to do, for he receives the Profits of the Church; and by the Canon *opus ibi cum emolumentis*; but 'tis otherwise at Common Law, for if the Seat is not *in nave Ecclesie*, the Ordinary hath nothing to do with it.

Chancellor.

IN ancient Times, Emperors and Kings had so great Esteem of the Piety of Bishops, that they gave them Jurisdiction in particular Causes, as in Marriages, Adultery, Last-Wills, &c. which were determined by them in their *Consistory Courts*.

But when many Controversies did arise in those and other Cases, it did not consist with the Character of a Bishop to interpose in every litigious Matter; neither could he dispatch it himself, and therefore it was necessary for the Bishop to depute some subordinate Officer, experienced both in the Civil and Canon Laws, to determine those (*n*) Ecclesiastical Causes; and this was the Original of *Diocesan Chancellors*.

Under this Title I shall treat,

1. Of the Antiquity of a *Chancellor*, and how he must be qualify'd for the Office.
2. To whom it may be granted.
3. What Estate a *Chancellor* hath in this Office.

First, The Antiquity of the Office.] Some have been of Opinion, that *Chancellors* were very late Officers, and introduced by the Sloth and Negligence of Bishops, unwilling to hear and determine those Causes in which they had a Jurisdiction.

(*m*) 5 Mod. 389. (*n*) Sid. 88. 201.

But the learned (o) Sir *Tho. Rydley* tells us this is a Mistake; for in the first Ages of the Church, the Bishops had those Officers which were called *Ecclesiastici*, that is, Church-Lawyers, who were bred up in the Knowledge of the Civil and Canon Laws, and their Business was to assist the Bishop in his Jurisdiction throughout the whole Diocese; and because the *Chancellor* doth the same thing now, therefore he concludes that the Office was the same with those ancient Church-Lawyers.

But probably they were not Judges of *Ecclesiastical Courts*, as *Chancellors* are at this Day, but only advised and assisted the Bishops themselves in giving Judgment; for we read of no *Chancellors* here in all the *Saxon* Reigns, nor after the Conquest, before the Time of *H. 2.* for that King requiring the Attendance of Bishops in his State-Councils, and other Publick Affairs, it was thought necessary to substitute *Chancellors* in their Room, to dispatch those Causes which were proper for his Jurisdiction.

And here it may not be improper to give the Reader a short Account by whom the ancient Ecclesiastical Jurisdiction was exercised in this Kingdom; and that was by the Bishop, in conjunction with his Clergy, in a *Diocesan Synod*, whose Decrees were obligatory only in that Diocese, and extended no further.

But about that Time, *Gratian*, who was sent Legate to our *H. 2.* by Pope *Eugenius III.* had collected and published a Book of Canons, which that Pope, for the real value he had for the Book it self, or rather to honour the Publisher, who was his Nephew, commanded to be taught, and allowed it to be received, as containing the standing Rules to decide all Ecclesiastical Cases throughout the Western Church.

It was upon this Occasion, and at this Time, that the ancient Ecclesiastical Jurisdiction was alter'd in this Nation; for now the Bishops and their Clergy were to study this new Book of Canons, in order to give a right Judgment in such Cases; but it happened to be at a Time when the Clergy were so miserably oppressed by the Monks, and many of them were reduced to such narrow Circumstances, that they gave up this Right of sitting in Judicature with their Bishop, whom they were forced very often to Petition even for a moderate Subsistence: And the Prelates themselves were arrived to such a degree of Grandeur, that they did not only Preside in State-Councils, but built and fortified Castles as well as Monasteries, and maintained both Horse and Foot-Soldiers at their own Charge, and assumed such exorbitant Privileges and Immunities, that made them little inferior to crown'd Heads, with whom they often contended upon the least supposed Aggreviance; and therefore it being beneath their Dignity to study the Canon Laws, they, in imitation of Kings, did appoint and constitute *Chancellors*, who had been bred up in the Knowledge of these Laws at our

Universities, where they were publicly taught, or in some other Nation, where they were generally received.

In a few Years afterwards a *Chancellor* became such a necessary Officer to the Bishop, that he was not to be without him; for if he would have none, the Archbishop of the Province might enjoin him to depute one, and if he refus'd, the Archbishop might appoint one himself; because 'tis presumed, that a Bishop alone cannot decide so many Spiritual Causes which arise within his Dioceses.

The Person thus deputed by the Bishop hath his Authority from the Law; and his Jurisdiction is not, like that of a Commissary, limited to a certain Place, and in certain Causes, but extends throughout the whole Diocese, and to all Ecclesiastical Matters; not only for Reformation of Manners, in Punishment of Criminals, but in all Causes concerning Marriages, Last-Wills, Administrations, &c.

The learned Lord *Verulam* was never satisfied in these Deputations; for by all Laws in the World, Offices of Skill and Confidence are prohibited to be executed by Deputy, except such a Power to depute is contained in the original Grant: A Judge never yet made a Deputy, and a Bishop is a Judge of the highest degree.

Besides, all Judicial Offices are Personal, and so are all Trusts: These are Things inherent, and cannot be transferred to another; so that by what I have mentioned, 'tis probable that when Bishops became Grandees of Kingdoms and Privy Counsellors to Princes, then they delegated this Jurisdiction to *Chancellors*, in imitation of Kings, who are usually attended with such Officers.

[His Qualifications.] As to his Qualifications, neither a Layman, or married Person, could exercise this Office by the Canon Law, or any other Ecclesiastical Jurisdiction whatever; but after (p) H. 8. had re-assumed the Supremacy, a Law was made, by which *Doctors of the Civil Law*, whether married or not, might be made *Chancellors*, and sit as Judges in Bishops Courts.

'Tis true, this Law was repealed by a (q) Statute made 1 & 2 Ph. & M. but it was revived by 1 Eliz. 1.

By the Canons of King James, no Man is to be admitted to be a (r) *Chancellor*, except he is learned in the Civil Law, and at least a Master of Arts, or Batchelor at Law, and 26 Years old.

It hath been a Question since the Statute 37 H. 8. and before that Canon, Whether a *Batchelor at Law* was capable of being a *Chancellor* or *Commissary*? And it was adjudged that he was capable; for the (s) Statute is not restrictive to *Doctors of the Civil Law* alone, so that no other Person might be a *Chancellor*.

(p) 37 H. 8. cap. 17. (q) Canon 127. (r) Cro. Eliz. 314, The
(s) Cro. Car. 314, L 3

The like Point was adjudged since the (1) Canon, between *Walker* and *Sir John Lamb*; in which Case it was held, that the Statute, 37 H. 8. was an Affirmative Law, and did not restrain the Office to a Doctor of Law.

If therefore the Knowledge of the Civil Law qualifies a Man to be a *Chancellor*, then he, who is not competently learned in that Law, is not capable of that Office; and therefore *Dr. Sutton*, who was *Chancellor* to the Bishop of *Gloucester*, and who was only Rector of a Parish-Church, and not instructed in the Civil or Canon Law, was deprived by the Ecclesiastical Commissioners for that very Reason, tho' it was objected that he had a (u) Patent from the Bishop for his Office, which was confirmed by the Dean and Chapter; and so had a Freehold for his Life, which could not be determined by Ecclesiastical Commissioners.

But this was denied by Justice *Doderidge*; for tho' the Office was granted for Life, yet the Officer having no Skill to execute it, he had no Freehold in it; for his Insufficiency created an original Incapacity, so as to make the Grant void, *ab initio*.

It must be agreed, that the Right which he had to receive the Profits was Temporal, but the Exercise of the Office was Spiritual; and therefore the Ecclesiastical Court is proper to determine whether the Person is sufficiently qualified in Point of Learning, in the Canon and Civil Laws, to execute such an Office or not; and shall not be prohibited.

But if that Court will deprive a Person for Matters cognizable at Law, then the Judges will Prohibit them.

The Case of *Dr. Sutton*, before-mentioned, is the only Case where a *Chancellor* hath been deprived by the Spiritual Court for Insufficiency. It was lately attempted upon a Libel against *Dr. Jones*, *Chancellor* of the Diocese of *Landaff*, for the like Reason, viz. for being unlearned in the Canon and Civil Law; but the Doctor had recourse to the Temporal Courts for a (x) Prohibition, which was granted, and he declared upon it; but the Case was not determined.

'Tis true, the Statute above-mentioned allows, that *Doctors of the Civil Law* may be made *Chancellors*; which is only a bare Permission, but doth not enjoin them to be so: And 'tis observable, that it was made in the very next Year after H. 8. had made *Cromwell* his Vicegerent in Ecclesiastical Matters, so that it seems designed to give Authority to that Commission; but Complaints have been often against those who make Laymen *Chancellors*, as if a Clergy-man was not capable of the Office, when 'tis certainly most agreeable for one in Holy Orders; for many of them have not only Experience in those Laws by which Ecclesiastical Cases are to be decided, and may therefore be competent Judges to hear and determine the

(1) Godb. 390. (u) 2 Roll. Abr. 286. (x) Mod. 27.

same; but they are qualified by their Orders, as Spiritual Persons, to pronounce the final Sentence of Excommunication against those who refuse to obey their Decrees, which no Layman can do; and no other Instance can be given in any sort of Judicature whatsoever, where one Man sits as Judge to Try the Cause, and another, who never heard any of the Proofs or Allegations, give Sentence against the Offender.

Whether it may be Granted to Two.] The next Thing to be consider'd is, to whom it may be granted, viz. whether to One or Two: And as to that, it hath been doubted, whether a Judicial Office, as this, might be granted to Two, because they may differ in Judgment, which might be a Delay to Justice; for one may Excommunicate, and the other Absolve. But such a Grant may be supported by Usage, that is, if the Office was granted to Two before the Statute (y) 1 Eliz. it may be granted so afterwards; for that provides, That all lawful Grants made by Ecclesiastical Persons, of any Office, in old Time wont to be granted, shall be good.

Anno 8 Jac. this very Office was granted to (r) Dr. Trevor and Griffin. And in the Case of Dr. Jones, it was granted to him and another; and there being several Grants of the Office to Two since the Statute, it was an Inducement to the Court to believe that it was granted so before.

What Estate he hath in the Office.] I shall in the next place consider what Estate the Person hath in this Office: And this, by the ancient Ecclesiastical Laws, was not an Estate for Life, for a Grant of Jurisdiction did cease by the Death of the Grantor; and there is a very good reason for it, viz. *Né invitus habeat Officiale fortassis illi odiosum.*

This was the Opinion of (a) Justice Doderidge, in the Prebend of Hatchecley's Case, viz. That such a Grant was not good, but during the Life of the Bishop, and should not bind his Successors; And my Lord Coke was of the same Opinion, viz. That it was very hard it should not be in the Power of the Successor to remove him, but that he should be bound to answer for the Acts of another who was never deputed by him.

But now the Patents for such Places are generally made for the Life of the Grantee, and by Vertue of such Grant he is made the Judge of the Consistory Court: And the legal Acts of that Court are reputed and taken as the Acts of the Bishop himself, by whose Authority he sits; for there lies no Appeal to him as the immediate Superior, but to the Archbishop of that Province.

The Canonists hold, that by a general Grant of this Office, nothing passes but a Power or Authority to hear Causes; and that the Bishop, by appointing a Chancellor, doth not divest

(y) Cap. 4. (r) 2 Rol. Rep. 306. Cro. Car. 55. (a) Noy 152.

himself of any other Power, which he hath as Ordinary, but he may delegate all or any part of it by Special Commission to others; for tho' by the Statute 37 H. 8. Doctors of Law are made capable of exercising all manner of Ecclesiastical Jurisdiction, yet the *Bishops* from whom 'tis derived may limit and circumscribe it to particular Acts and Cases, but this is seldom done.

Lastly, A Chancellor thus deputed may make a Lease of a (b) Rectory, which shall be good without the Confirmation of the Dean and Chapter, for he is not *infra minores ordines qui famulantur Ecclesie*. He is a Prebendary and more; for he hath a Prebend and a Dignity, and is seised in Fee in Right of the Church within the very Words of the (c) Statute, 32 H. 8.

Chantry.

THIS was a little Chappel, or a particular Altar in a Cathedral-Church, built and endowed for the Maintenance of a Priest to sing Masses, which were held satisfactory to redeem the Soul of the Founder out of Purgatory; and from those Prayers, in this Place, it was called a *Chantry*, and the Priest who officiated there was called a *Chantor*, or Souls-Priest.

The original of *Chantries* here was in the Thirteenth Century, when the Doctrine of Purgatory was invented and received; for there were many of those in *England* before the Dissolution, for any Man might build a *Chantry* without the leave of the *Bishop*; and this was by the Authority of the Pope, for in those Places, and by those Priests, the Doctrine of Purgatory was maintained; but in latter Times, none could build these *Chantries* without the King's License.

In the Reign of H. 8. when the Belief of Purgatory began to decline, and the Trade of Redeeming Souls from thence decreased, it was thought an unnecessary thing to continue the Pensions and Endowments of those Priests; therefore Anno 37 H. 8. cap. 4. these *Chantries* were given to the King, who had Power at any Time to issue Commissions to seize those Endowments, and take them into his Possession; but this being in the last Year of his Reign, there were several of those Endowments which were not seized by Virtue of any such Commissions; Therefore, Anno 1 Ed. 6. cap. 14. those *Chantries* which were in Being five Years before the Session of that Parliament, and not in the actual Possession of H. 8. were adjudged to be, and were vested in that King.

But because many of those *Chantries* were actually surrendered to H. 8. therefore there was a Clause in this last Statute to confirm such Surrenders, with a saving the Right of others.

(b) Sid. 158. 1 Lev. 112. (c) Cap. 28.

About 27 Years after this Statute of *Ed. 6.* a Man had a Parcel of the Possessions of a *Chantry*, which he held by the Payment of (d) Rent and Fealty; these Lands came to the King, who granted them to another: It was held that the Patentee should enjoy it by Virtue of the Grant, and should pay the Rent to him who was Lord before, not as a Rent-Service, but as a Rent-Charge; for which he might Distrein of Common Right.

I shall mention such Cases which I find to have been adjudged upon this Statute; but first I must repeat the Words of the Statute it self.

All Chantries, and all Lands belonging to them, and given and appointed to the finding a Priest, to have continuance for ever; and also all Annual Rents employed for the Maintenance of any stipendiary Priest for ever, are vested in the King.

Now the word *given* before-mentioned doth not import an absolute (e) Gift; for if Lands were given upon Condition to find a Priest, &c. 'tis within this Statute: And so it is, tho' the Gift is for Life, notwithstanding the words of the Statute are, *viz. Given to the finding a Priest for ever*; because the chief Intent of the Law-makers was to suppress all such superstitious Uses.

* If Land of the Value of 20 l. *per Annum* was given to find a Priest, without mentioning how much of it shall be applied for his Maintenance, in such Case the Whole is vested in the King by this Statute.

So 'tis, if, by the Gift or the Will of the Donor, the Priest is limited to receive only 10 l. for his Maintenance, because the other 10 l. shall be intended for the finding Necessaries to carry on the Superstition, as Vestments, Books, &c.

But if the other 10 l. had been given to the Poor, that had been a good Use; and in such Case, the King should have but the 10 l. allowed to the Priest, as an Annual Rent issuing out of the Land; for where-ever there is a good Use coupled with a bad one, the (f) King shall have no more but what is appointed for the superstitious Use.

As for instance; Where two Houses, *Anno 6 H. 7.* were devised for the (g) Maintenance of an *Obit*, at 3 s. 4 d. Annually, and the rest of the Profits to repair the Church; in such Case, the Queen shall not have the Houses, but only so much as was appointed for maintaining the *Obit*, which was a Funeral Solemnity every Year, in Commemoration of the Death of the Founder.

But in such Case, some of the Profits must be implied for that good Purpose for which they were designed, and not all to the superstitious Use; for if Lands, of the yearly Value of

(d) 1 And. 45. (e) 4 Rep. 104. (f) Moor 692. (g) Cro. Eliz. 449.

9 l. 4 s. were given to find a Priest to pray for the Soul of the Donor, and to sing an *Obit*; out of which he appointed that the Priest should yearly receive 6 l. 13 s. 8 d. and for the *Obit* 13 s. 4 d. and the Residue to repair the Church: Now, tho' the last was a good Use, yet it was held that those Lands were vested in the King, because the superstitious Uses amounted to 7 l. 7 s. And there was a Quit-Rent of 2 l. 2 s. issuing out of the Land, and due to the King at the Time of the Devise, both which amounted to more than the yearly Value of the Land; so there could be nothing remaining for the (b) good Use:

But where both those Uses meet in one Gift, and it doth not appear how much shall be applied to each Use, there the Queen shall have the Whole; because of the uncertainty, which would have been otherwise, if the certain Quantity had been limited to each Use; for then the (i) Queen should have only so much as was implied to support the superstitious Use.

It must be likewise a *Chantry* in Fact, and not in Reputation; for if the Lands are not given or implied to superstitious Purposes, but only reputed so, those are not given to the Queen.

As for instance; A Man devises 400 l. to the (k) Dean and Chapter of York, to find a *Chantry* in their Church for ever; and an *Obit* every Year for the Death of the Founder, and appointed how much the Priest should have for his Maintenance.

The Dean and Chapter received the Money of the Executors of the Donor, and obliged themselves, *ac omnia bona sua*, to perform his Will.

Afterwards they purchased Lands with this Money, and appointed a Stipend for the Priest, and another Sum for the *Obit*: Now, tho' these Lands were purchased for this very purpose, yet this was held not to be a *Chantry* by the Will of the Donor, because the Money, and not the Land, was given; and the Dean and Chapter did not make it a *Chantry*, because they did not oblige their Lands, but their Goods, for the Payment of this yearly Pension to the Priest.

Chaplain; } See { Plurality.
 } { Residence.

IN former Times, when the Kings of France were engaged in Wars, they always carried St. Martin's Cap into the Field; which was kept in a Tent as a precious Relick; and from thence the Place was called *Capella*, and the Priests, who had the Custody of that Tent, were called *Capellani*; and from them those who minister in sacred Affairs were afterwards called *Chaplains*.

(b) Jones 387. Cro. Car. 455. (i) Moor 189. 263. (k) 2 Cro.

These Persons amongst us are only such as officiate in the free Chappels of the Queen, or in private Oratories of Noblemen and others; who by the Statute 21 H. 8. cap. 13. have Power to retain the Number following :

| | | | |
|--------------------------|-----|-------------------------------|-----|
| Almoner, | 2 | Comptroller of the Household, | 2 |
| Archbishop, | 8 | Dean of the Chappel, | 2 |
| Baron, | 3 | Duke, | 6 |
| Barons Widow, | 2 | Duchess, being a Widow, | } 2 |
| Bishop, | 6 | and tho' she marries, | |
| Chancellor, | 3 | Earl, | 5 |
| Chief Justice, | 1 | Knight of the Garter, | 3 |
| Clerk of the Closet, | 2 | Marquess, | 5 |
| His Widow, tho' she mar- | } 2 | Secretary of State, | 2 |
| ry, that doth not take | | Treasurer of the Household, | 2 |
| off the Qualification, | 2 | Viscount, | 4 |
| Master of Rolls, | 2 | Warden of Cinque-Ports, | 1 |

NOTE, That tho' Widows of Dukes, Marquesses, Earls and Barons do marry under that Degree, they may retain Two Chaplains, which shall be qualify'd within this Law.

These Persons thus retain'd have the Privilege to get a Dispensation to hold Two Livings; and in such Case, if they are legally inducted into a second Living, tho' the Lord is afterwards attainted, or remov'd from his Office, they shall hold both during their Lives; but if attainted or displac'd before the Chaplain is preferred to a second Living, then the Qualification is gone.

Chappel.

THE Word is deriv'd from *Capella*, mention'd in the last Title, which was a little Tent, wherein Relicks were kept; but afterwards it was taken for every private Chappel or Oratory,

With us here in England there are several Sorts;

1. Parochial Chappels, and these differ only in Name from Parish Churches, but they are small, and the Inhabitants within the District are few, in respect to larger Churches and Parishes; and formerly these were united to Churches.

But if there is a * Presentation *Ad Ecclesiam*, instead of *Capellam*, and an Admission and Institution upon it, 'tis no more a Chappel, but a Church; and if upon an Avoidance there should happen to be any Disturbance, the Patron may have a *Quare impedit presentare ad Ecclesiam*.

* 6 Rep. 66. 1 Rol. Rep. 126. Hob. 66.

2. *Chappels* which adjoin to, and are part of the Church; and those are such which were built by honourable Persons, for Burying Places for themselves and Families.

3. *Chappels of Ease*, and those are usually built in very large Parishes, where all the People cannot come to the *Mother-Church*; and in these *Chappels* the *Cure* is usually serv'd, either at the Charge of the Rector, or of such, who, by Custom or Composition, are to provide a Minister to officiate there; but generally the Sacraments are to be administer'd in the Parish Church, and not in these *Chappels*.

'Tis true, in some particular Districts, where there are such *Chappels*, they may baptize and administer the Sacraments, and may have *Chappel-Wardens*; but these *Chappels* are not exempt from the Visitation of the Ordinary, nor those who resort thither, from contributing to the *Repairs* of the *Mother-Church*, especially if they bury there; for tho' some part of the Parish have always repair'd the *Chappel*, yet 'tis still the same Parish, and they are Part thereof, and therefore of common (o) Right ought to contribute to the *Repairs* of the Church; and the rather, because such *Chappels* were built for their Ease, for they are oblig'd to go to the (p) *Mother-Church*, but not to the *Chappel*; yet they may be discharg'd of this Duty by Prescription, tho' 'tis against common Right; but then they must shew some special Cause, upon the very (q) Endowment it self; for 'tis not sufficient to alledge, that time out of mind, they have repair'd their own *Chappel*, and by reason thereof have been discharg'd towards the *Repair* of the Church, because 'tis no direct Prescription; but if they prescribe generally to be discharg'd, without shewing for what (r) Cause; or if they alledge that, time out of mind, they have repair'd part of the *Wall* of the Church-yard, and their own likewise, or shew any † *Modus* to pay a certain Sum yearly towards the *Repairs* of the *Mother Church*, such a Prescription is good.

But the latter Authorities are, that such Prescriptions are good, if they can shew any reasonable Cause for them,

As for instance; The *Churchwardens* of *Aston* in *Northumberland* libelled in the *Spiritual Court* at *Durham*, for not repairing their Church; the Defendants mov'd for a Prohibition, and suggested that they had a *Parochial Chappel* within the Parish of || *Aston*; and that the Inhabitants had, time out of mind, a *Parochial Chappel*, and *Divine Service* and *Sacraments* there (but did not say *Burials*) and had always been exempted from *Repairs* of the Church, in Consideration they had been charg'd to repair their *Chappel*, which was always done; and upon this

(o) 2 Rol. Abr. 289. (p) Hob. 66. 67. 1 Rol. Rep. 126. 2 Rol. Rep. 263. 265. (q) 2 Rol. Abr. 290. 2 Rol. Abr. 311. Contra. (r) 2 Rol. Abr. 290. † This was the Case of *Goosey* and *Stanford*, in Com. Berks, || 2 Lev. 102.

Suggestion a Prohibition was granted to try the Custom, which was agreed to be good, if the Chappel had *Sacramenta, Sacramentalia & Sepulturae*; but if *Burials* were at the *Mother-Church*, that would be a reservation of the ancient Right, by which those of the *Chappeltry* were bound to contribute to the *Repairs* of the *Church*, which is very true; and yet such a Prescription hath been held good, tho' the *Burials* have still been at the *Mother-Church*.

For about Four Years afterwards the like Case came in Question, between the Inhabitants of * *Adderbury* in *Oxfordshire* and those of *Bodecutt*, which is a Village in that Parish, and which had a Chappel, Chancel, Bells, & *omnia alia Parochialia Trophea*; and also Divine Service, Sacraments, Perambulations, distinct from *Adderbury*; that they never went to that Church, had no Seats there, but that they had distinct *Churchwardens*, and no other Use of the Parish Church of *Adderbury*, but to bury their Dead there, and by reason all this had been discharg'd to repair that Church: This was held to be a good Custom, notwithstanding the *Burials* were at the *Mother-Church*.

4. Free Chappels; and these are such which were founded by Kings of England: This appears by the Writs of Prohibition, when the Privileges of such Chappels have been invaded by Abbots and others; for the Recital is, (*f*) *Cum Ecclesia, &c. per Progenitores nostros, quondam Reges Anglia, fundata, &c. Capella Libera à primava sua fundatione fuerit*; where the Word *Libera* imports, that 'tis free from all Episcopal Jurisdiction, and only to be visited by the (1) Founder and his Successors, which is done by the Chancellor; but yet the Queen may License any Subject to build and endow a Chappel, and by her Letters Patents exempt it from the Visitation of the Ordinary.

5. Chappels in the Universities, belonging to particular Colleges, these are consecrated, and Sacraments are administer'd there; but they are not liable to the Visitation of the Bishop, but of the Founder.

6. Domestick Chappels, which were built by Noblemen and others, for the private Service of God in their Families; and these are not consecrated, they may be built without the Leave of the Bishop; but by the Canon Law, Chappels, which had Parishes united to them, could not be built without his Consent; and because Domestick Chappels might, 'tis probable, for that Reason, they are exempted from his Jurisdiction.

Church.

I shall not treat of this Word in a Theological Sense, as being a Congregation of People met together to worship the True God, and to partake of the Sacraments according to the

* 2 Lev. 186. (*f*) Regist. 40. 41. (1) N. B. 42.

Institution of our Saviour; neither shall I treat of the *Rulers*, *Believers*, and *Catechumens*, which were the Three Orders of Men, of which the Church was at first compos'd, any farther than to tell the Reader, that the Rulers were the *Bishops*; the Believers were those which were baptiz'd; and did partake of the *Communion*, and were therefore call'd *Illuminati*; because their Understandings were suppos'd to be enlighten'd by the Knowledge of the true Religion.

The *Catechumens* were not admitted to the Privilege of Baptism; they were not so much as to stand in the Church when the Communion Service was begun; they were not allow'd to hear any Discourses in the Church of the mysterious Points of Religion, but only such which relate to Morals; nor were they permitted to say the *Lord's Prayer*.

But to return; I shall treat of this Word in a legal Sense, relating only to the Place where this Worship is perform'd; and this I will do under these different Apellations.

1. *Cathedrals*, of which the *Bishop* is Incumbent.
2. *Collegiate*; and these were Monasteries, of which Abbots and Priors were formerly the Heads.
3. *Parochial*, of which Rectors and Vicars are Incumbents.

As to the first of these, I find that when our *Saxon* Ancestors were converted to *Christianity*, they us'd such *British Churches* which were then standing, and those were very few.

But *Ethelbert*, King of *Kent*, built Two; and by his Example other great Men were encourag'd to do the like.

Bede, our first *English* (u) Historian, gives us an Account of Two more, which were built by Noblemen; and 'tis probable, he had not mention'd it, if it had been a common Thing to build Churches in those Days, or if many had been then built; from which we may conclude, that the Work went on very slowly; for tho' the Piety of some Bishops mov'd them to so good an Undertaking, and particularly *Birinus*, an *Italian*, who was sent hither by Pope *Honorius*, to preach the Gospel, and who built a Church at *Dorchester* in *Oxfordshire*; yet there were not Churches enough in the Nation to contain the Converts, for they usually met in the Field, where they worship'd publicly under an erected Cross.

But in the Churches thus built, the Bishop and his Clergy liv'd in Common, whom he sent out to particular Places to preach the Gospel, where he thought they might be most successful; and these are the Churches we now call *Cathedrals*.

These were dedicated to the Service of God in those early Days, and were preserv'd for that Purpose, when the Abbies were demolish'd at the beginning of the *Reformation*, and now stand as the stately Monuments of the Piety of our Predecessors, affording a competent Maintenance to many ingenuous

(u) Lib. 5. cap. 4.

Persons, who are well descended, and who have devoted themselves to the Ministry of the Gospel.

2. *Collegiate* ; The State of an Ambulatory *Clergy* being found to be inconvenient, and several Churches being built where Christianity most prevail'd ; but still, at some Distance from the *Cathedrals*, the Bishop settl'd a competent Number of *Presbyters* there, which not long after were call'd *Collegiate Churches*, and these were liberally endow'd by the great and pious Men of that Age.

3. *Parochial* ; In succeeding Ages when the Nation became populous, and many Villages were built, some of them more remote from the *Cathedrals*, the Bishop gave Leave that Churches should be built there, and transfer'd the Right of Baptism and Burial to them, which with the Right of Tythes made them *Parochial* ; and not long after, Lords of Mannors built more Churches on their own Lands, for the greater Conveniency of themselves and their Tenants, and made Parishes of their own Demesnes, but this was not till the latter End of the *Saxon Reigns* ; for *Bede*, who was a Monk himself, complain'd to *Egbert*, Archbishop of *York*, above 200 Years after the Conversion of the *Saxons*, that there was a great Want of Parochial Settlements in his Days, which implies that there were some such Settlements.

But when Churches were built, it was necessary to fix the Bounds within particular Districts, that the People who resided there, might know where to attend the Worship of God ; and Laws were soon made by the Consent of the Bishops, that the Lords of Mannors might retain a Third Part of the Tythes, arising yearly within their Mannors, from the common Treasury of the Diocess, for the use of their Churches ; and thus a Parochial Right of Tythes became vested in the Rectors of those Churches ; and when this began, I shall acquaint the Reader under the Title *Parish*.

And here it may not be improper to mention the ancient Ceremonies, in consecrating the Ground on which the Church was intended to be built, and of the Church it self after it was built.

When the Materials were provided for building, the Bishop came in his Robes to the Place, &c. and having prayed, he then perfum'd the Ground with Incense in a circular Motion, then the People sung a Collect in praise of that Saint to whom the Church was to be dedicated ; then the corner Stone was brought to the Bishop, which he cross'd and laid for the Foundation.

After these Ceremonies one would think some stately Fabrick was to be erected ; but the Churches were then so very mean, that when the Candles were set before the *Relicks*, they were often blown out by the Wind, thro' the Chinks and thinness of the Walls ; and it was upon this Occasion that King *Alfred* invented *Laniborns*.

But

But as mean as they were, those Churches were always consecrated, and a great Feast was made on that Day, or on the Saint's Day to which it was dedicated; but the form of the Consecration was left to the Discretion of the Bishop.

There was one drawn up here in 1661, but it was never authoriz'd; and probably it was made, because so great an Office was taken at Bishop Laud's consecrating St. Katherine Creech Church in London, which was thus:

He came on a Sunday, being the 16th Day of January, Anno 1630, to the West Door of that Church; and some Persons, who were prepar'd for that Purpose, spoke aloud these Words, viz. *Open, open ye everlasting Doors, that the King of Glory may enter in.*

Immediately the Doors were open'd, and the Bishop and some other Doctors enter'd; then he kneel'd, and with Eyes lifted up, and his Arms spread, he pronounc'd the Place to be Holy, in the Name of the Father, &c.

Then he threw some of the Dust of the Church into the Air several Times, as he approach'd the Chancel; and when he came to the Rails of the Communion-Table, he bow'd towards it several Times.

Then they all went round the Church repeating the hundred Psalm, and afterwards a Form of Prayer, which concluded thus, viz. *We consecrate this Church, and set it apart to Thee, O Lord Christ, as Holy Ground, not to be profan'd any more to common Use.*

Returning to the Communion-Table, he pronounc'd Curses against those who should prophane that Place, and at every Curse he bow'd towards the East, and said, Let all the People say, *Amen.*

Afterwards he pronounc'd Blessings on all those who should be Benefactors, and repeated, Let all the People say, *Amen.*

Then there was a Sermon, and after that the Sacrament was administer'd; and when he came near the Altar, he bow'd seven Times; and coming to the Bread, he gently lifted up the Napkin, which he laid down again, and withdrew, and bow'd several Times; then he uncover'd the Bread, as before; the like he did with the Cover of the Cup, and so the Ceremony ended.

In the next Place I shall treat of,

1. Rates made to repair Churches.
2. Who are bound to repair, and who not.
3. Of Ornaments, who is to contribute to them, and who not.

Rates.] As for Rates, made either for repairing the Church, or fencing the Churchyard; they are to be made by the Churchwardens, who are to give a general Summons at the Church, that the People may meet at a certain (x) Time and Place for that Purpose; and the Majority of those who meet upon such a

(x) Hetley 61.

Summons shall conclude the whole (y) Parish; but if they refuse, or neglect to meet, then the Churchwardens alone may make the Rate.

If 'tis illegally made; or impos'd by the Ordinary, without the Consent of the Parishioners; yet, if they agree to it afterwards, it shall bind.

Now these Rates must be made upon the whole Parish, and not upon a particular Person; and if made to raise Money to repair the Church, tho' that Word may comprehend the Chancel; yet if the Money is laid out to repair the (z) Chancel, the Parish are not to allow it in the Churchwardens Accounts; but if 'tis expressly made for the Repair of both, 'tis illegal, and the Temporal Courts will prohibit any Proceedings to recover it.

If a Rate is made on Lands to repair the Church, and for making a new Clock and Chimes, and for dividing the Church-House, and for relieving the Poor, 'tis too late to move for a Prohibition after Sentence in the Spiritual Court, and to suggest that several of these Matters are not cognizable in that Court.

When these Rates are made, 'tis the proper Business of the Churchwardens to collect the Money, but by Custom the Constable may be bound to do it; and therefore if a Libel is brought against him (a) for refusing to collect it, a Prohibition shall not go, because the Spiritual Courts may try this Custom.

Repairs.] Concerning Repairs I shall begin with the (b) Canon, which requires every Person who hath Authority to hold Ecclesiastical Visitations, to view the Churches within their Jurisdiction once in Three Years, either in Person; or cause it to be done, and they are to certify the Defects to the Ordinary, and the Names of those who ought to repair.

These Repairs must be done by the Churchwardens (c) at the Charge of the Parishioners; and the Ecclesiastical Judge may excommunicate any, or all of them, for any Neglect in not repairing.

It hath been a Question whether this is a real Charge upon all the Lands in the Parish, or only upon the Persons in respect of their Lands; (d) and the better Opinion is, That 'tis a Personal Charge by reason of the Lands, for where the Owner or Occupier refuses or neglects to contribute to repair, &c. the Lands cannot be sequestred, but the Persons may be excommunicated, (e) for the Ordinary hath a Jurisdiction over them, but not over their Lands; he is not to meddle with the Possessions of Laymen, but to proceed against them by Ecclesiastical Censures.

(y) 1 Vent. 367. (z) 1 Mod. 236. (a) Hardres 510. (b) Canon 86. (c) 1 Mod. 194. (d) 2 Mod 255. 2 Vent. 35. (e) 1 Mod. 194.

However, 'tis such a Charge on the Lands (f) that no Custom can be good to discharge it; as if a Custom is alledg'd, that the Defendant ought not to be rated according to the Value of his Lands, but to the Value of his Sheep-Walks; this is a void Custom.

If a Man live in one Parish, and hath Lands in another, which he keeps in his own Hands, he shall be charg'd to the Repairs of that Church where his Lands are, and not where he liveth; for tho' the Charge is upon the Person, yet 'tis in respect of his Lands, (g) and therefore as to this Purpose he is a Parishioner where the Lands are, and not where he lives.

If he let his Estate to a Tenant the Tax shall be set on the Farmer, because it may not be known who is Landlord; but he is not to pay the whole, for he may plead in the Spiritual Court that he is only the Farmer, &c. and he is to pay no more than what the Land is worth above the Rent, (b) and the Landlord must pay according to the Rent reserv'd.

If Lands lye in Two Parishes, (i) and the Owner is su'd to contribute to the Repairs of the Church in one of the Parishes for that Part of his Lands which lies in the other Parish, suggesting a Custom for it, which was deny'd by the Defendant; this Custom shall be try'd at Law.

And when the Libel is for not repairing, &c. (k) 'tis not sufficient for the Defendant to suggest, that other People have Lands in the same Parish which are not charg'd; for if 'tis true, 'tis a good Allegation against the Libel in that Court; because the Rate ought to be made upon the whole Parish, and 'tis a just Cause to appeal from a Sentence there, but not for a Prohibition.

The Spiritual Court hath original Jurisdiction of Repairs of Churches, and Rates for that Purpose being an Incident to Repairs, they have the like Jurisdiction in those Cases; and when a Suit is brought in that Court against the Defendant, for a proportionable Part of such a Rate, he may be compell'd to put in his Answer upon || Oath, whether he hath paid it or not: 'Tis true, they cannot require an Oath to make a Man perform an Agreement, nor the Oath which they call *Juramentum Calumnia*, which was frequently done in former Days, when they cited Men to their Courts *Pro lesione Fidei*, pretending that the Defendants had sworn to a Thing which they did not perform, and then they made them really swear to perform it; and in the other Case they made them swear to accuse themselves when there was no other Proof, and such Accusation was allow'd to be Evidence against them at Common Law; these were

(f) Hetley 131. 2 Rol. Rep. 463. (g) Cro. Eliz. 659. 843. 2 Rol. Abr. 289. 5 Rep. 66. (b) 2 Rol. Rep. 270. (i) 2 Rol. Abr. 308. (k) Rol. Abr. 290. 2 Rol. Rep. 262, 206. || 2 Lev. 247. 1 Vent. 339.

Things introduc'd by the Canons, contrary to the Customs of the Realm, and therefore in such Cases the Courts at *Westminster* granted Prohibitions; but they always requir'd Oaths *In Causis Matrimonialibus & Testamentariis*; because Contracts of Marriage and Wills were made privately, and the Legitimation of Children depended on such Contracts, and *Interest Reipublice Testamenta rata haberi*: This therefore was the Law of those Courts, and the Usage being for them to require Oaths about Payment of Rates, hath likewise made it the Law of the Court:

Ornaments.] The Roman Catholicks spare neither Art or Costs to adorn their Churches, and to set out that Service which they offer therein with the greatest Magnificence imaginable; whilst the Reform'd generally follow that narrow Opinion of the Disciple who thought all Riches wasted which were bestow'd on Churches; as if the great Creator of the World had enrich'd it with so many precious Varieties only to administer to our Pride, and that the meanest Things should be us'd in his Service:

But these Men do not consider that our Senses are awaken'd by bright and noble Appearances, and thereby quicken'd to that Reverence which is due to so great a Power; 'tis true, we have some Ornaments in our Churches, tho' but mean in respect to those in other Nations; and for these the Charge is upon the Personal Estates of the Parishioners, (1) and not upon their Lands; and therefore, if a Rate is made to charge the Lands, a Prohibition will be granted.

'Tis for this Reason that the Person must be charg'd where *he lives*, and not where his Lands are; (m) for if the Libel is for Ornaments, 'tis a good Plea to say, that he was not a Parishioner there at the Time of the Rate made.

The Rate must be made upon all the Parishioners of Ability, and none are to be excus'd, and 'tis the Majority in this Case, as well as in the other, for Repairs of the Church, which conclude all the rest, but then they must be assembl'd at a Vestry after publick Notice; (n) therefore where a greater Part agreed to have a fifth Bell, and the less Number disagreed, yet the whole Parish was concluded.

But tho' generally Lands ought not to be rated for Ornaments, yet by a special Custom both Lands and Houses may be liable to it; and so it was held *Hill. 9. Will. in B. R.* between *Hawkins* and *Ross*, viz. The Churchwardens of the Parish of *St. Edmond on the Bridge* in *Excester* libell'd against the Defendant, setting forth an ancient Custom within the Parish, that they and their Predecessors had adorn'd the inside of the Church at the publick Charge of the Owners and Occupiers of ancient Houses within that Parish, by a Rate made by them, with the Consent of the major Part of the Parishioners, having respect

(1) 2 Rol. Abr. 291. 2 Rol. Rep. 262, 270. (m) 2 Rol. Rep. 262. (n) 2 Rol. Abr. 291.

to the annual Value of the said Houses ; and this was held to be a good Custom.

† So where a Rate was made on Lands to repair the Church, to make a new Clock and Chimes, for Bread and Wine at the Sacrament, for Clerks Fees, for dividing the Church-house into several Rooms, for the Use of the Poor, for Relief of poor Prisoners in the *Marshalsea*, and for Expences at several Visitations ; the Court would not grant a Prohibition, tho' it was objected that this Rate was made for several Matters, of which the Spiritual Court hath not any Jurisdiction, *viz.* To repair the Church-house, and for Relief of poor Prisoners, and likewise for Chimes, which are Ornaments, and for which Lands ought not to be rated ; 'tis true, it was after Sentence, and an Appeal to the Arches ; and in such Cases a Prohibition is always deny'd, if nothing appears in the Libel it self to oust the Spiritual Court of Jurisdiction.

In the next Place I shall mention a few Things,

1. Concerning Ways leading to Churches.
2. Who are oblig'd by the Laws to come to Church.
3. What the Law is concerning quarrelling there.
4. How it protects the Persons of those who come thither.
5. And lastly, I shall treat of the Union of Churches.

The Ways which lead to Churches are only private, because they belong to the Inhabitants of particular Villages ; and therefore if the Churchwardens libel for a Way for all the Parishioners, if the Defendant suggests that 'tis a *common High-way*, a Prohibition will be granted.

Any Parishioner may prescribe to have a Way to the Church, (o) but in the Prescription he must set forth what Way, *viz.* Whether a Horse or Foot Way, and from whence, and thro' what Place it leads to the Church, and this will be a good Justification in an Action of Trespass.

2. The Laws which are made to oblige People to come to Church, are

By the Statute 1 *Eliz. cap. 2.* every Person is to come to his Parish-Church (or upon Let thereof) to some other Church every *Sunday and Holiday*, upon Pain of the Censures of the Church, and likewise to forfeit 12 d. to be levy'd by the Churchwardens, for the Use of the Poor, by way of Distress.

And any Justice of the Peace of the Division where the Offender liveth may send for him, (p) the Neglect being prov'd by one Witness upon Oath ; and if he cannot give a satisfactory Excuse, the Justice may direct a Warrant to the Churchwardens to levy that Penalty by Distress ; and if that cannot be had, then to commit him.

† 2 Lutw. 1019. (o) 2 Rol. Abr. 287. (p) 3 Jac. cap. 4.

By another Act made *Anno 23 Eliz. cap. 2.* every Person not coming to Church, as enjoyn'd by the aforesaid Act, 1 *Eliz.* being convicted thereof, shall forfeit 20 *l. per Month* over and above the aforesaid Forfeiture of 1 *s.* and if he forbear for 12 Months, then the Bishop of the Diocese, or Judge of Assize, or Justice of Peace of the Country where the Offender lives, certifying it into *B. R.* he shall be bound with Two Sureties in 200 *l.* to be of the good Behaviour, and shall continue bound till he conform.

The Forfeiture is to be divided into Three Parts; to the Queen, to the Poor, and to the Prosecutor, and to be recovered by Action of Debt, Bill, Complaint, or Information; and if the Party is not able to pay it, he shall be committed till paid.

There is a Proviso in this last Act, That if the Offender, either before he is indicted, or at his Arraignment or Trial, before Judgment, shall conform himself before the Bishop of the Diocese where he shall be resident, or before the Justices where he shall be indicted, arraign'd or tried (having not before made the like Submission at any Trial) shall, upon his Recognition of such Submission in open Assizes or Sessions of the County where such Person shall be resident, be discharg'd against all and every the said Offences, and of all Pains and Forfeitures for the same.

There is likewise a Proviso to the same Effect in the Statute 1 *Jac. viz.* That if a *Recusant* shall submit and be obedient to the Laws of the Church, and continue there during the Time of Divine Service and Sermon; that he shall be discharg'd of the Penalties which he might suffer for Recusancy so long only as he shall continue in Conformity.

Three Years after the making the Statute 23 *Eliz.* an Action of Debt, *Qui tam, &c.* was brought against *Thomas Warbell* for the 20 *l. per Month*; (q) there was a Verdict against him, and it was mov'd in Arrest of Judgment, that no Place was set forth where the Offence was committed; but the Exception was not allow'd, because the Action was grounded upon a *Nonfeance*.

But a Conviction on a Prosecution at the 4 Sessions is a good Bar to an Action of Debt, *Qui tam, &c.* brought by an Informer on this Statute.

In *Dr. Foster's Case*, which was an Information upon this Statute, (r) it was objected that there must be a Conviction upon a former Prosecution, before the Information could be brought, because the Statute is, *viz.* That the Person being convicted shall forfeit, &c. but it was rul'd that the Conviction might be upon one and the same Information.

(q) 1 *And.* 138. † 1 *Lutw.* 101. *Noy*, 117. *Lane* 60. *Bridg*, 120. 2 *Cro.* 480. (r) 11 *Rep.* 60. 2 *Bullst.* 325. 1 *Roll.* *Rep.* 95.

There was another * Information brought for 20 l. *per Menssem*, and it concluded, *Contra formam Statuti in hujusmodi Casu Editi & Provisi*; and the Objection was, that it should have *Contra formam Statutorum*, (*viz.* 1 & 13 *Eliz.*) But it was adjudg'd well enough; for tho' the Statute 1 *Eliz.* enacts that all Persons should come to Church, yet 'tis the Statute 13 *Eliz.* which gives the Penalty of 20 l. *per Menssem*.

If a Man is outlaw'd upon this Act, (f) he shall not be discharge'd upon Submission and Conformity till the Outlawry is revers'd, or he is pardon'd.

But if not outlaw'd, then Conformity before Judgment, either before the Ordinary, or in Sessions, discharges the Penalties.

Therefore, if before a Verdict (t) the Defendant comes into Court, and submits and acknowledges his Offence, and proves that he had conform'd since the Suit begun, by going to Church and receiving the Sacrament, &c. tho' a Verdict is afterwards given; this shall discharge the Penalties, because the Conformity was before the Trial; besides, the Penalty acquires no Debt or Duty till Judgment.

I shall only add, That the Prosecution upon these Acts must be within a Year and a Day after the Offence; but that by a Statute made 1. *Will.* neither of those Laws are to extend to Protestant Dissenters from the Church, subscribing the Declaration mention'd in the Statute 30 *Car.* 2. *Cap.* 1.

3. That due Reverence and Attention may be had in the publick Worship, all Quarrelling is prohibited, either in the Church or Churchyard; and if any one offend in such Case, the Ordinary, upon Proof of the Fact by Two Witnesses, may suspend him *Ab ingressu Ecclesiæ*; and if a Clerk, *A Ministerio Officii*.

The Proceedings for Quarrelling or Brawling may be in the Spiritual Court, *Pro salute Anima*, but not for any Damages; but the Party may have Costs there, † *Pro expensis litis*.

Striking or laying Hands on another there, (u) the Offender shall be *Ipso facto* excommunicated; but if 'tis with a Weapon, or if 'tis only drawn for that Purpose, the Offender is to lose one of his Ears; now tho' the Words *Ipso facto* take off the Formality of a Sentence of (x) Excommunication, yet before he is excommunicated he must be convicted at Law, and that must be transmitted to the Ordinary.

If a Man should be indicted on this Statute it must not be (y) generally, but the Fact must be brought within the Letter of the Law, and therefore the Indictment must set forth with what Weapon the Person did (z) strike, for 'tis not sufficient to

* 3 Lev. 61. Cro. Eliz. 750. (f) 4 Leon. 54. (t) Raym. 465. † 2 Cro. 462. 4 Rep. 20. (u) 5 & 6 Ed. 6. cap. 4. (x) 1 Vent. 146. (y) Cro. Car. 464. (z) Cro. Eliz. 231. 2 Leon. 188. Noy. 171. alledge,

alledge, that *Extraxit gladium* against another, & *ipsum percussit*, but it must be according as the Statute is penn'd, viz. *Extraxit Gladium ad percutiend'*, and that *Malitiose percussit*; for to set forth generally that he did strike is not good; to strike without a Weapon is Excommunication *Ipsa facto*, as hath been observ'd; to strike with a Weapon is the Loss of one Ear; therefore where a Commitment was made by Justices of Peace for disturbing a Minister *Per apertum factum*, the Prisoner was discharg'd, because they ought to set forth the particular Fact, as pulling him by the Gown, using any chiding or quarelling Words; but for any indecent or irreverent Behaviour, the Party may be indicted at the Sessions.

Due Reverence is likewise enjoin'd by the * Canon, which requires that no Man shall cover his Head in the Time of Divine Service, except he have some Infirmary; and then he must wear a Cap; and that all Persons shall Kneel when the Prayers are read, and stand up at the *Belief*, and shall bow at the Name of *Jesus*; and shall not walk or talk, or go out of the Church without some reasonable Excuse.

And the † Churchwardens shall not suffer any idle Persons to be in the Churchyard or Porch, but shall cause them to come in or depart; and they are to || present the Names of Offenders in such Cases at the next Visitation.

4. And in order to protest those who come to Church, we have Laws (a) to secure their Persons, *Eundo, morando & redeundo*, to or from Divine Service; the Person offending may be excommunicated, and pay Costs in Spiritual Court, or may be indicted and fin'd in the Temporal Courts, but the Arrest is good in Law.

But these Statutes relate only to Arrests in Civil Actions, and do not extend to Arrests for a Breach of the Peace, for that is at the Suit of the Queen.

5. I will conclude this Title with a few Observations concerning Union of Churches.

Before the Statute 37 H. 8. cap. 21. Churches might be united by the Consent of the Bishop, Patrons and Incumbents, or at least, there were such Unions before that Act, for otherwise there had been no Occasion to confirm them by that Statute.

There are several Reasons given for these Unions, but the most material are, because the Rector might have a better Maintenance, or because the Churches are so near that one Incumbent may supply both, or because of the Poverty of one of the Parishes.

But by the Statute before-mention'd one of the Churches must not be above the yearly Value of 6*l.* in the Queen's Books, and not above a *Mile distant* from the other; and if in a

* Can. 18. † Can. 19. || Can. 111. (a) 50 Ed. 3. cap. 5, Ric. 2, cap. 15.

Corporation, then no Union can be made without the Consent of the Magistrates, declar'd in Writing under their common Seal.

And by the Statute 17 *Car. 2. cap. 3.* the Bishop of the Diocess, with the Consent of these Magistrates, together with the Patron, may unite them.

But the Parishes are still to be distinct as to Rates, Taxes and Parochial Rites, and distinct Churchwardens are to be chosen, so that the Union chiefly respects the Place where the Parishioners are to meet to worship, neither shall it be good until enter'd in the Bishop's Register, or if the Revenue of both exceed 100 *l. per Annum.*

This last Act doth remedy an Inconveniency which was before; for the Union, by Virtue of the Statute 37 *H. 8.* could not be made but upon an Avoidance, or if the Church was full, then not without the Consent of the Incumbent; but by this Statute it may be made, whether the Church is full or not; for if full, then 'tis not to commence till after the Avoidance of one of the Churches, to which the other Incumbent is to succeed.

And by a subsequent Statute (*b*) 'tis enacted, That if one of the Churches should be demolish'd, then as often as the other is out of Repair, or wants Ornaments, the Parishioners of the demolish'd Church must contribute towards the same in such Proportion as the Ordinary, who made the Union, shall direct; and for want of such Direction they shall contribute one Third Part towards the Charge.

Now where Two Churches were united (*c*) by Virtue of that Statute 37 *H. 8.* upon the Suggestion, that they were not distant above *One Mile*, and the Parishioners are su'd in the Spiritual Court for not coming to Church, they may have a Prohibition upon a Surmise that the Churches were more than a Mile apart.

Our Law in this Case is agreeable to the ancient Canons of the Church, which allow'd the Bishop to unite Two small Benefices, for the better Support and Maintenance of the Minister; but then it was to be under such a Value, and the Union was not to be *Ad visam*, but so long only as the Bishop should think convenient to continue it.

And this appears where Pluralities were most strictly prohibited, which was always upon this Condition, *Si facultas suppeditur*; which Words imply, That where there was an incompetent Maintenance a Man might have Two Livings, at a reasonable Distance, and with the Allowance of the Bishop; and accordingly * *Balsamon* tells us, That in the *Greek Church*, Pluralities are allow'd, if the Benefices are near, and under the same Bishop.

(*b*) 4 & 5 Will. (*c*) 2 Rol. Abr. 293. * Addit. 2. N^o. 10.

Churchwardens.

THESE are very ancient Officers; and by the Comm on Law are a Lay-Corporation, to take care of the Goods of the Church, to which they had a Right for the Benefit of the Parishioners.

Under this Title I shall mention,

1. By whom Churchwardens are to be chosen.
2. Of Presentments made by them.
3. What Actions they may bring, and for what.
4. When and to whom they are to accompt.
5. Of Actions brought against them.

1. They are chosen every Year by the joint Consent of the Minister and the Parishioners; but if they cannot agree, then the Minister shall chuse one, and the Parishioners another; and this is by Virtue of (d) the Canon.

But before the making this Canon the Parishioners in some Places chose both the Churchwardens, and where that was us'd the Canon doth not abrogate the Custom; and in such (e) Case, if the Archdeacon should refuse to swear them, a *Mandamus* lyes, for every Parish had formerly a Right to chuse their Churchwardens; but because they vary'd in the manner of Chusing, therefore a Custom might be alledg'd, and Issue might be taken at (f) Law to try whether a select Vestry, or the whole Parish ought to chuse,

And to such a *Mandamus* the Archdeacon ought not to return, *Quod non sibi constet*, that there is such a Custom, for his † Return should be positive, upon which an Action might be grounded to try the Custom, which was allow'd by the Court to prevail against the Canon.

And if he should return a Custom for the Parson to chuse one, and it should happen to be false, both the Churchwardens may join in an Action on the Case against him for such a false ‖ Return, in which Damages shall be recover'd by both.

In 2 *Lutw. fo. 1012*. There is a President of such an Action on the Case, brought by a Churchwarden against a Chancellor of the Diocess of Chester, upon refusing to swear him, and returning to a *Mandamus*, that he was not chosen Churchwarden of the Parish of St. Peter in Chester.

In (g) Carpenter's Case the *Mandamus* was directed to the Commissary to swear Two Churchwardens, who were chosen by the Parishioners, by Virtue of a Custom which the Rector denied, and insisted upon his Right, by Virtue of a Canon to chuse one; the Commissary made a special Return, which is set forth at

(d) Canon 89. (e) Jones 439. Cro. Car. 551. 589. 2 Rol. Abr. 4234. 287. (f) Hardres 379. † 1 Vent. 267. ‖ 3 Lev. 362. (g) Raym. 439.

length in the Report; but a *Mandamus* was granted, for the *Ecclesiastical Court* cannot try the Custom.

2. As at the Common Law, the Enquiry is to be made by Juries; so by the *Ecclesiastical Laws*, the Enquiry is to be made by Churchwardens: And this is the chief Design of Visitations.

By the *(b) Canon* they are to make their Presentations of such Things which are given in Charge at the Visitation, but not oftner than once in a Year, where it hath been no oftner used; nor above twice in any Diocess whatsoever, except it is at the Bishop's Visitation.

But voluntary Presentments of any notorious Offenders may be made oftner.

And this is not only to be done, *ex Officio*, but they are obliged, by Oath, to make their Presentments upon a Book of *Articles*, given to them in the Visitation, and, upon Refusal to take the Oath, they may be excommunicated; but then if any of these Articles concern himself, he is not obliged to take such Oath, but only to do what belongs to his Office: And if he should be excommunicated in such case, 'tis good Cause for Prohibition; and if he is not absolved upon Request, an Attachment lies.

The Presentments which they make, must not be with a malicious Design to vex the People; for if so, then an Action on the Case lies against them; but if they have a Verdict, they shall not have double Costs; tho' the *(i) Statute* expressly provides that they shall, where the Action is brought against them for any thing done by Virtue of their Office, because their Presentments are meerly Ecclesiastical; and the *(k) Law-makers* never intended to give double Costs, but where Officers were sued for Temporal Matters, done by them in Execution of their Office.

The Books in the Margent warrant this Distinction, but 'tis a nice one; for the Churchwardens are not named in the Statute 7 Jac. which gives the double Cost; but that Statute being made perpetual by 21 Jac. the Churchwardens are declared to be within the Purview of the former Statute.

Now, if Officers shall recover double Costs, when sued for what they do only in Temporal Matters, then this Declaration is almost in vain; because the Office of a Churchwarden, especially in making Presentments, relates chiefly to such Matters which concern a Spiritual Jurisdiction.

The Time of making these Presentments is usually at Easter; and these *(l) Officers* may be prosecuted in the *Spiritual Court*, as perjur'd Persons, if they willingly neglect or omit to make their Presentment at that Time.

(b) Canon 117. *(i)* 7 Jac. cap. 5. 21 Jac. cap. 12. *(k)* Cro. Car, 285, Jones 530. *(l)* Can, 117.

What Actions they may have, and what not.] As to this Matter, 'tis generally held that Churchwardens have no Power to do any thing to the disadvantage of the Church; and therefore if they recover in an Action, one of them cannot release the Costs.

So if they Libel in the Bishop's Court against a Parishioner for not paying a Tax assessed on him towards the Repair of the Church, and there is a Sentence against; and, upon an Appeal to the Metropolitan, one of the Churchwardens releases, this doth not discharge the Appeal; because the Spiritual Court, having the original Jurisdiction of Taxes for Repairs, shall likewise have Jurisdiction of all Matters which depend thereon; and therefore that Court shall determine whether this Release will bar both the Churchwardens, adjudg'd upon a Demurrer to a Prohibition.

They may maintain an Action on the Case against him who shall deface a * Monument in the Church; or an Action of Account against their Predecessors for a † Bell, or any Goods belonging to the Church, but then they must declare, *De bonis Parochianorum*; or an Action of ‖ Trespass for any Thing taken out of the Church, which belonged to the Parishioners: And this the new Churchwardens may do, tho' the (m) Trespass was done in the Time of their Predecessors; and a Release by one is no bar to the Action of the other, because they have no proper (n) Interest in the Things themselves for which they Sue, but are only a Special Corporation for the Benefit of the Church; and therefore they are always to conclude their Declaration, *Ad damnum Parochianorum*, and not to their proper Damage.

But the Suits which they bring in the (o) Spiritual Court must not relate to any Thing concerning the Inheritance; Therefore if they Libel for a Way to the Church, or to repair the Fences of the Church-yard, by reason of Lands adjoining; or that the Defendant, and all those whose Estate he hath in such a House, have used to find Bread and Beer for the Parishioners in their Perambulation; these are all Temporal Matters, and the Allowance of such a Refreshment is in Nature of a Corrody, for which an Assize will lye.

They cannot prescribe to have Lands, because they are not a Corporation for that purpose, viz. to have Lands to them and their Successors, but only for the Goods of the Church, March 66, but in London 'tis otherwise, 2 Cro. 532. Neither can they have any Action of Trespass at Common Law, to recover Goods, of which they never were possessed; but by a Bill in Equity, they may have a Decree for such Goods; and they may have an Appeal of Robbery, if stolen.

* Godb. 279. † 1 Vent. 88. ‖ 1 Rol. Rep. 57. (m) Cro. Eliz. 145. 179. 1 Leon. 177. (n) 1 Rol. Rep. 426. 2 Rol. Abr. 306, 2 Cro. 234. (o) 2 Rol. Abr. 287, If

If they are cited in the (p) *Ecclesiastical Court*, after they have given up their Accompts, and should be excommunicated, they may have an Action on the Case against the Prosecutor.

They may * join in an Action upon the Case for a false Return upon a *Mandamus*; for such a † Writ may be brought to compel the *Spiritual Court* to swear a Churchwarden who was lawfully chosen by the Parishioners, according to Custom.

When and to whom they are to Accompt.] They are accountable to the Rector, Vicar, New Churchwardens and Parishioners, for what Goods and Money they have received for the Use of the Church; (and this must be done at the end of the Year) and what remains in their Hands, they are to deliver to the New Churchwardens, by a Writing indented: And if they refuse to give up their Accompts within a Month after the New ones are chosen, they may be compelled by the *Ecclesiastical Court*, or may be presented at the next Visitation, or the New Churchwardens may have an Action against them at Law; But by a particular Custom, they give up their Accompts to 24 of the chief Men of a Parish. And this was the Case of the Churchwardens of the Parish of *Massam* in *Yorkshire*.

Of Suits brought against them.] They may be sued in the *Spiritual Court* for taking away any Goods of the Church, as Bells, &c. and in such Case the Court will decree the Things to be returned in (q) *Specie*; but if the Suit is at Common Law, then Damages are to be recovered.

By the Bishops Articles they are to * Present *filthy Talkers, Revilers, and common Sowers of Sedition among Neighbours*, and an Oath is usually tendered them for that purpose: Now, if they would refuse to take such Oath, because they are general Terms, and may comprehend Things out of their Jurisdiction, and should for that Cause be excommunicated, they ought to have pleaded, *Quod non tenentur respondere* to those Things; and if the *Spiritual Court* refuse that Plea, they may have a Prohibition.

Anno 18. Car. 2. an (r) Indictment was brought against the Churchwardens of *St. Martin in the Fields*, for taking a Silver Cup, *Colore officii corrupte & extorsive*; and this was for placing a Man to be a Gallery-keeper in the Church: It was objected, that this was not an Office, but an Employment belonging to the Churchwardens themselves, and they might depute any Man to assist them.

But the words *corrupte & extorsive* being in the Indictment, the Court would not quash it till that Fact was tried; and if it appeared they held accounted to the Parish for the Cup, then it might be quashed.

(p) Raym. 418. * 3 Lev. 362. † Lutw. 1010. (q) Sid. 281, 282. * 1 Vent. 114, 127. Quære. (r) Sid. 307.

Lastly, I shall mention some Things which they may do by Virtue of their Office; as for instance, They may justify the taking a Man's * Hat from his Head in the Time of Divine Service; for tho' they may Present this irreverent Behaviour in the *Spiritual Court*, yet they are to take care that all Things be decently done in the Church at that Time:

They may order a crack'd † Bell to be new Cast, or they may dispose of the Stones belonging to the Church; but this must be by the Agreement of the Parishioners.

So they may dispose of any of the Church ‖ Goods in their Possession, but not without the Consent of a Vestry.

Church-Yard.

THE Church-Yard is likewise the Free-hold of the Parson; but 'tis the common Burial-Place of the Dead, and for that reason 'tis to be fenced at the Charge of the Parishioners, unless there is a Custom to the contrary, or for a particular Person to do it, in respect of his (s) Lands adjoining to the Church-yard; and that must be tried at Common Law.

But tho' the Free-hold is in the Parson, he cannot cut down Trees growing there, except for the necessary Repairs of the (1) *Chancel*; because they are planted, and grow there for the Ornament and Shelter of the Church.

This is the ancient Common Law of this Kingdom, and therefore the Statute made, *Anno 35. Ed. 1. Ne Restores prosterant arbores in camisterio*, is but declarative of that Law; and the Restors, who cut down Trees for any other purpose, may be indicted upon that Statute, and fined, or may be prosecuted at Law: And the Courts at *Westminster* have granted Prohibitions in such Cases, to stay any further Waste.

It hath been a (u) Question, Where the Rectory is impropriate, and the Vicaridge endowed, to whom the Trees in the Church-yard do belong? If to the *Vicar*, 'tis only because he is to repair the Church; and if the Impropiator cut them down, and the *Vicar* Libels against him in the *Spiritual Court*, a Prohibition shall go, because if he hath a Right to the Trees, he may bring an Action of Trespass against the Impropiator for selling them.

Cisterrians.

THESE were an Order of Monks, very much admired here for their Piety and Strictness of Life; for by this means, when they first came hither, which was soon after the Conquest, they ingratiated themselves so much to the People,

* 1 Lev. 196. † 1 Rol. Abr. 121. ‖ Rol. Rep. 426. 3 Bulst. 264. (s) 1 Rol. Abr. 287. (1) 1 Rol. Rep. 255, 235. (u) 1 Rol. Rep. 255. 2 Rol. Abr. 311, 337.

that they soon got Lands; upon which they wholly subsisted, and paid Tythes out of these Lands to the Rectors of these Churches to whom due.

Afterwards having built Monasteries, they disliked Appropriations to them, calling it Sacrilege to take Tythes from the Secular Clergy; but by degrees growing rich, and having founded Abbies in the Reigns of *H. 1.* and King *Stephen*, and other succeeding Kings, all which were well endow'd, then their Zeal for the poor Clergy abated; and at last they got as large and as many Privileges to exempt their Lands from Payment of Tythes, as any Order whatsoever.

My (x) Lord Coke tells us, that at first most of the Orders of Monks were exempted from Payment of Tythes out of such Lands which they held in their own Hands; but that Pope *Adrian IV.* restrained it to the *Cistercians*, *Templars*, and *Hospitallers*: And this he tells us was in the Year 1150. which was towards the latter end of the Reign of King *Stephen*; and yet in the same Page he tells us, this Privilege was granted to those Orders of Monks, by the *Council of Lateran*, which was not held till above 60 Years afterwards, viz. 17th of our King *John*, Anno 1215. But Bishop (y) *Stillingfleet* is certain that *Council* made no such Decree.

Now this Restriction of *Adrian* was not narrow enough, because it extended to all the Lands of those Orders, which they had, or might hereafter have; and therefore Pope *Innocent III.* many Years afterwards, restrained this Privilege to the Lands which these Orders then had, which was before the (z) *Lateran Council*; and this Decree of that Pope was received by the general Consent of the Kingdom: And therefore this Privilege was limited to those Lands, which those Orders had before that *Council*; tho' 'tis generally held in our Books, that the *Cistercians* were discharged of Payment of Tythes, by the aforesaid *Council*.

So that what Lands they had after that *Council* could not be legally discharged; and therefore those who claim any such Privilege, ought to prove that they enjoyed the Land before that *Council*; and the Proof ought to be the stricter, because 'tis a Privilege which they claim against common Right.

Now 'tis certain, that several Lands were given to this Order, since that *Council*, which, if found out, are not exempted at this Day: For tho', by the Statute of (a) *Dissolution*, &c. all Lands were discharged, which were in the Hands of the Abbots at that Time; yet this is no good Discharge, because the Statute puts such Lands only in the same legal Capacity to be discharged as they were in before; now if they were given since that *Council*, they were not in a legal Capacity to be discharged at all.

(x) 2 Inst. 652. 2 Cro. 454. (y) *Still. Eccles. Cases*, 213. And
(z) *Hardres*, 101. (a) 31 H. 8.

And here I shall only mention the several Ways for discharge of Tythes without the help of any Statute.

1. By the Pope's Bull, which was a Grant of this Privilege to the several Orders before-mentioned.
2. By real Composition, or a Prescription, *in modo decimandi*, of which I have already treated under that Title.
3. By a general Prescription, *in non decimando*.
4. By Unity of Possession.

Now as this *Privilege* to the particular Orders before-mentioned, it was only *Personal*, which the Canonists tell us, *Non transit de una persona in aliam*; and therefore where a Corporation is dissolved, which was formerly vested with that Privilege; or if they grant their Lands under their Common-Seal, the Privilege is gone, and the Grantee shall pay Tythes:

Besides, 'tis to be observed, that these Bulls made no legal Discharge of Tythes, but only in such Cases where the Law allowed, that is, where the King and People admitted and received them, and so they became established by Usage and Custom; and therefore those *Cisterrians* were under a *Præmunire* (as shall be observ'd hereafter) for putting in Execution the Pope's Bulls to exempt their Lands from Payment of Tythes, *in the Possession of their Farmers*, when it was allowed that their Lands only should be discharged which *propriis manibus Excolebant*.

Those of the Order of the *Præmonstracenses* had likewise a Bull to be discharged from Payment of Tythes, which was granted to them by Pope *Innocent III*. Now tho' this was a great Order in *England*, yet that Grant was never allowed here; and as often as they complained to the Pope of it, so often the People complained against them to the Parliament for claiming a Privilege which was never allowed, *Popb. 157*.

Neither did this Privilege extend to some real Compositions; as for instance, The Abbots and Convents of the Order of *Cisterrians* had made real Compositions with the Rectors for Tythes due to them for their *demesne* Lands; and this Privilege of Exemption did not extend to such Compositions.

In the Progress of a little more than 100 Years, these *Cisterrians* pretended to so great Privileges, that they not only claimed to have their Lands discharged of Tythes, but from Taxes to the King; for they refused to contribute to the publick Levies in the Time of King *John*, who, *Anno 11*. of his Reign, was engaged in Wars with the *Irish* and *Welsh*: And this made that King exact from that Order 33000 Marks, a great Sum in those Days; and not contented with this, he confiscated all their Goods, and would not suffer them to hold any Chapter till the Money was paid.

This brought them into so mean a Condition, that they depended upon other Orders of Monks for their Subsistence.

But

But about 30 Years afterwards, they so well recovered this Loss, that *H. 3.* desired the Archbishop of York to ask them for a Year's Profit of their Wooll.

They desired to be excused; however the Archbishop pressed it so much, alledging, that the King was always willing to help them in their Necessities; and enforcing his Request with other Arguments, that an Abbot of that Order replied, The King was sworn to do Justice; and that whilst he governed according to Law, and committed no Oppression, they would give him any Thing for the Health of his Soul, and the Good of the Kingdom.

But still they refused to contribute to the Support of the Government; and not only so, but they opposed the Pope himself: For *Gregory X.* having given leave to *Otto* his Legate, to receive Procurations from the Order; (*indulgentia concessa eisdem ordini non obstante*) the Legate exacted Money of them, instead of Procurations, which in those Days were to be paid in Victuals; but they pretended to have Bulls of Exemption, from Payment of all manner of Procurations, and therefore they withstood the Legate's Demands; and the Pope, to soften the Matter, commanded him, that in his Visitation he should be contented, *cibis regularibus absque usu carniū*, and not to take any Money: And this, (*b*) Mr. Prynne tells us, was the first, *non obstante*, which was opposed in England.

But these Monks were not contented that the Lands which they possessed themselves should be discharged of Tythes; for they attempted to get the Pope's Grant, to exempt the Lands which they had Lett to Farmers from Payment of Tythes; and this would certainly have impoverished the poor Secular Clergy, to whom such Tythes were due.

Therefore, *Anno 2 H. 4. cap. 4.* the Parliament being acquainted with this Matter, a Law was made, prohibiting the *Cisterciens*, and all other Orders of Monks, to procure Bulls for such Discharges, under the (*c*) Penalty of a *Premunire*, that is, to forfeit his Goods, and the Profits of his Lands during Life; and to be also imprisoned during Life.

But 'tis agreed on all sides, that they were discharged from Payment of Tythes for Lands which they possessed themselves, before the *Lateran* Council; and that by (*d*) *2 H. 4.* their Farmers and Tenants ought pay Tythes: Now, if an Abbot and Convent of this Order had made a Lease of their Lands before the Dissolution, &c. and afterwards that Lease had expired, and the Grantee of the King had kept the Lands in his own Possession, they should so long be discharged of Tythes; tho' by the Statute of (*e*) Dissolution, the King was to have

(*b*) Prynne on the 4th Institut. 129. (*c*) Burnet's Hist. Ref. 1 Pl. 108, 109. Degg. 234. (*d*) Dyer 277, 278. (*e*) 31 H. 8. cap. 13.

the Lands in the same manner as the Governors held them; which at that Time payed Tythes, because they were then Let to Farm.

It hath been a Question, What Lands shall be said to be in Possession of this Order? As for instance, if Cattle are agisted on their Lands; whether this can be properly said to be (f) *in propriis manibus*? And 'tis held it cannot; for the Profits, which is the Herbage, are not taken by the Owner of the Soil, but by Cattle; and therefore the Owner of the Cattle, or of the Soil, must pay Tythes, but rather the Owner of the Cattle.

But this; and all other Orders of Monks, being long since dissolved, or surrendered to the Crown, I shall no longer insist upon any Matters relating to them, but shall refer my Reader to the Title (*Monks*) herein after mentioned, where he will find, that all the ancient Abbies were of the Order of *St. Benedict*; that *Glassebury-Abbey*, in *Somersetshire*, was the first which was founded in *England*, of above 200 l. per Annum, of which Order there were 52 Abbies and Priories of above that Value, at the Time of the Dissolution; and that the *Cisterrians* encreased faster than the *Benedictines*, for in a little more than the compass of one Age, there were 37 Abbies, and other Religious Houses of that Order; of above the yearly Value of 200 l.

Citation.

THIS is a Precept under the Seal of the Ecclesiastical Judge, commanding the Person, against whom the Complainant is made to appear before him, on a certain Day, and at a certain Place therein mentioned, to answer the Complaint in such a Cause, &c. And 'tis required by the (g) Canon, that the Name of the Party shall be expressed in the Citation, and that the Hand and Seal of the Judge shall be affixed to it.

It hath been a Question, Whether a Citation, serv'd on a Sunday, is good? Since the making the Statute, 29 Car. 2. which prohibits the serving Process on that day, except in Cases of Treason, Felony, or Breach of the Peace: And it hath been likewise questioned, Whether personal Service is necessary at any Time? Because it hath been the usual Course, before the Statute and since, to fix it on the Church-door; and this, being according to the Law and Custom of the Ecclesiastical Courts, is not taken away by the general Words of the Statute before-mentioned; but such fixing it on the Church-door is (h) good, and a sufficient ground for an Excommunication.

The Archbishop of *Canterbury* had such a transcendent Power and Jurisdiction here, that he could cite any Man to the Court of *Archb.* out of the remotest part of the Kingdom; and this he could do for any trifling Cause, as for Defamation, &c.

(f) *Hardres* 1840: (g) Canon 129. (h) 5 Mod. 450.

and for any frivolous Presence for not paying Tythes; and the Apparator making Oath; that the Party was duly cited, and not appearing, he was excommunicated, and could not be absolved without paying the Fees of the Court, and of the Apparator, which was usually 2 *d.* per Mile.

This was found to be a great Oppression; and therefore by the Statute, 23 *H. 8. cap. 9.* it was provided, That for the ease of the Subject, no Person should be cited to appear out of the Diocess, or peculiar Jurisdiction where he liveth, under Penalty of double Damages to the Party grieved, to be recovered by Action, &c. and also 10 *l.* to the Queen and Prosecutor: But there is a Clause which excepts,

1. For some Spiritual Offence committed, or omitted, or done in the Diocess, to which the Party shall be cited.
2. Or upon an Appeal where the Party shall find himself agrieved by the Ordinary.
3. Or where the Judge either dares not, or will not cite the Party.
4. Or unless the Judge is Party to the Suit.
5. Or at the Instance of an Inferior Judge to a Superior, in Cases where the Canon Law, or Civil Law allow it.

My Lord Coke tells us, this Statute is but declaratory of the ancient Canons of the Church; and that 'tis particularly explained by the 94th Canon of King James, *viz.* That the Dean of the Arches shall not cite any Person who doth not dwell in the particular Diocess, or Peculiar of the Archbishop, for any Ecclesiastical Matter, without the leave of the Diocesan, except in those particular Cases abovementioned; for the Archbishop, before the Reformation, had not a concurrent Jurisdiction in every Diocess of his Province, but only as he was the Pope's Legate, and therefore the Judge of the Audience, who kept Court in *Southwark*; part of which is in the Diocess of *Winion*, and cited Persons thither from the furthest part of *Hampshire*, and excommunicated them if they did not appear; and would not absolve them, unless they submitted to have their Causes determined in the *Arches*. This was held contrary to the Statute.

As to the last of these Exceptions, *viz.* That a Man may be cited out of his Diocess at the Instance of an Inferior Judge to a Superior, where the Law allows it: These words are restrictive, and therefore all Causes may not be transmitted to a Superior Judge; as where a Chancellor of an inferior Diocess transmitted a Cause to the *Arches*, because it was so difficult, that the Plaintiff could not have Council in the Country; this was held an insufficient (*i*) Cause.

And it hath been a Question, Whether a Chancellor can transmit Causes to the *Archies*? Because 'tis still to a delegated Jurisdiction; therefore some are of Opinion; it ought to be from one Ordinary to another.

But 'tis agreed, that where a Peculiar is subordinate to a Bishop, there the Cause must be transmitted to him, and not to the Archbishop; unless the Peculiar is exempt from all ordinary Jurisdiction, and then it must be to the (k) Queen.

And when a Cause is thus transmitted, 'tis sufficient that it appear so upon a Motion, for it need not be * pleaded, tho' formerly it was held † otherwise.

And as a Man who lives in a Peculiar, may be cited by the Ordinary of that (l) Diocese where the Peculiar is; so if that Peculiar hath a Jurisdiction by Prescription, exempt from the Power of the Ordinary, then the Person must not be cited out of it.

I grant, the Dean of the *Archies* hath a Jurisdiction throughout the whole Province of *Canterbury* upon an Appeal brought; but he cannot cite one to the Court, who doth not dwell in the particular Diocese, or Peculiar of the Archbishop, without the leave of the proper Diocesan first obtained, except in the Cases abovementioned; and yet that Court shall be preferred before any other *Spiritual Court*: For if there are two (m) Executors, and one lives within the Jurisdiction of the *Archies*, and the other not; and if a Suit is brought against them, it shall be in the *Archies*, otherwise there would be a Failure of Justice; for one Executor cannot be sued without the other.

But a Man may be cited to the *Archies*, who lives in the Dioceses in *London*; and this by Virtue of a Composition between the (n) Archbishop and that Bishop: And 'tis for this Reason that the Archbishop never visits that Diocese.

'Tis true, this was always denied by Justice *Twissden*, who held that such a Composition was taken away by the (o) Statute; and that the Agreement between the Ordinaries could not prejudice the People, for whose Ease and Benefit that Law was made:

But tho' it was made for their (p) Ease; they must take Advantage of it in proper Time; for if a Man, who lives in an inferior Diocese, is cited to the *Prerogative Court* for a Legacy, (the Will being proved there;) and if the Sentence is for the Legacy, and that Sentence is confirmed upon an Appeal to the Delegates, then 'tis too late for a Prohibition, upon a Suggestion that the Party was cited out of the County where he lived, because he had owned the Jurisdiction throughout the whole Course of the Proceedings.

(k) Hob. 16. 186. * 1 Levintz. 186. † Latch. 180.
 (l) 2 Rol. Rep. 448. Sid. 90. (m) 1 Rol. Rep. 328.
 (n) Cro. Car. 339, 340. Hardres 379, 380. (o) Raym. 92.
 (p) Cro. Car. 97. M 2 K

If a Man comes into a Place to (q) Trade, tho' he is not properly an Inhabitant there; yet he may be cited to the Archdeacon's Court of that Diocese, for any Spiritual Offence by him committed there, tho' he inhabits elsewhere; for otherwise he might offend in one County, and remove to another, and so go unpunished.

And because no Person should be cited into several Courts for one and the same Offence, therefore 'tis provided by the (r) Canon, that where the Bishop and Archdeacon do either by Custom or Prescription visit at several Times in the same Year; that in such case the Archdeacon do under his Hand and Seal, and within one Month after his Visitation, certify to the Bishop, or his Chancellor, all such Presentments as were then made; and that the Chancellor do, within the like Time after the Bishop's Visitation, certify to the Archdeacon all Presentments made in the *Episcopal Visitation*: And the Penalty for not certifying, or for intermeddling in each other's Visitation, is Suspension from exercising Jurisdiction, until he pay the Costs and Expences to the Party grieved by such Vexation.

Clergy.

THIS word is derived from the Greek word *Cleros*, which signifies a *Portion*; for the Men of this Order are, or should be, in a peculiar Sense, the Portion of the Lord. 'Tis true, the People of *Israel* were called God's Inheritance, and so were the *Christians*, but it was in opposition to the *Heathens*; but the Offices, of Priests, both in the *Jewish* and *Christian* Church, were always distinct from those of the common People; and this was by the immediate Appointment of God himself.

In the Ecclesiastical Notion of the Word, it signifies the whole *Clergy*; but in the Legal Sense of it, 'tis distinguished from the *Prelates*, and signifies only the *Inferior Clergy*.

Rigaltius, in his Observations upon St. Cyprian's Epistles, and our Mr. Selden tell us, There was no Distinction in the Primitive Christian Church, between the *Clergy* and *Laiety*; but this must be a Mistake, for tho' all Christians are God's Portion and Inheritance, yet those, who are set a-part for his Service, are in a more peculiar manner his Portion; for we see, that under the *Mosaical Dispensation*, the Priests, the Levites, and the Laymen, had distinct Offices appropriated to them.

'Tis true, at first all the Disciples of Christ had a Commission to Teach and Baptize all Nations, and this was in order to convert the *Pagan* World; but when many Converts were made, there was a Necessity to form them into regular Societies; and there was the like Necessity to have Rulers

(q) Hardres 421. (r) Canon 121.

and Governors in such Societies, without which it was impossible they should subsist.

All the Superior Orders of Men in the Church were anciently called *Clerici*, but afterwards the Word was appropriated to Inferiors. 'Tis true, in the first Ages of Christianity some were distinguished by the Name of *Presbyters*, who were Men ordained to particular Offices in the Church; not by reason of their Age, as the Word it self imports, but by reason of their Qualification; These were settled in the Church by the Apostles themselves, with Power to *Preach*, and to Administer the *Sacraments*; they sat on each side of the Bishop, in his Cathedral, and were his standing Council, with whom he advised in all difficult Affairs of the Church.

But I shall not enlarge on the Word, my Intention being to treat of the Clergy, as they are a divided Estate of the Realm from the Laity, both as to their *Persons* and *Estates*, which they enjoy in Right of the Church.

And first, as to their Estates: They have certain Privileges which the Laity have not; as for instance, They are discharged from *Purveiance*, they are not to serve in any Temporal Office against their Will; and therefore where a Clergyman was made *Expenditor* by Commissioners of Sewers, he had his Writ of Privilege, for *Vir militans Deo non implicetur secularibus negotiis*; so is the Register, and so likewise is the ancient Law of this (s) Realm, *Quod Clerici non ponantur in officia*. This was the Archdeacon of Rochester's Case.

They pay no Toll for the Goods they have in Right of the Church, they are discharged from *Pontage* and *Murage*; but this is by the Common Law, which has been altered by several Statutes, and particularly in this Case; for tho' it hath been held that they are not comprehended under the *general Words* of the (t) Statute, for repairing Bridges, which enacts, That decay'd Bridges shall be repaired by the *Inhabitants*,

So by the Statute, 13 Eliz. the *People dwelling* in an Hundred where a Robbery is committed must produce the Felon; So by the (u) Statute, 2 & 3 Ph. & Maria, every *Householder* is to work on the Highways: And by another (x) Statute, all *Resiants* in the County shall be charged towards the building a Common Goal; yet by the latter Judgments and Authorities in Law, they are made liable to all publick Charges imposed upon the *People in general*, by Act of (y) Parliament, if not exempted by Name, and particularly for mending the Highways.

Then as to their *Persons*, in an Action of Accompt, the Sheriff cannot have a *Capias* to take the Body, but he must return *Quod clericus est beneficiatus nullum habens laicum feodum*;

(s) 1 Vent 105. 1 Lev. 303. (t) 22 H. 8. cap. 5. (u) Cap. 8.
(x) 33 H. 8. cap. 2. (y) 1 Vent, 273, 2 Lev, 139,

but in such case he shall have a Writ to the Bishop to summon him to appear.

His Body cannot be taken in Execution upon a Recognizance on a Statute-Staple; for he is exempted by the very Writ, viz. (2) *Si laicus, capias*, which implies, that if he is not a Layman, he must not take him.

So a Fine levied of his Spiritual Possessions shall not bar his Successors, because the Statute, 13 *Eliz.* makes all (a) *Estates suffered* by them void; and by Fine and Nonclaim an Estate is *suffered* to pass.

Now as the Law has taken care to protect their Estates and Persons in the Cases before-mentioned, and to secure a Maintenance for them without their Care or Labour, this should not make them remiss in the Cure of Souls, but rather encourage them in the diligent and conscientious Discharge of their Duty, which they ought to perform, if for nothing else, yet as a grateful Retribution to the State for such Laws, by which they have a constant and settled Reward for their Labours.

It cannot be denied, but that such Laws are very just and equitable; for 'tis reasonable, that whilst the Clergy, by a diligent Application to their Duty, are endeavouring the Service of God and the Church, they should be secured in all the necessary Conveniencies of this Life, especially since by this means the People are prepared for a better.

This is the greatest End and Design of their Ministry; and it was for this Reason that they are forbidden, by the 6th Canon amongst those which are called Apostolical, to intermeddle with Secular Affairs, or engage in any publick Office; and likewise by the 6th Canon, amongst those of *Africa*, to sollicite the Affairs or Law-Suits of other People:

But it was not the loss of Time only, which was the Motive to those excellent Constitutions; for 'tis very probable that some other important Considerations might have been the occasion of them; for when Men of this Order engage themselves in wordly Business, they insensibly depart from that primitive Simplicity which ought to be the great Ornament of their Lives, and they grow Cunning and Subtile in the Artifices of such Employments; they become Disputants in Politics, and are greedy of all manner of News: And this naturally involves them in those Intrigues which are the daily Business of Men who are fond of the Things of this World.

'Tis true, *Zonaras*, who wrote a Comment on the Apostolical Canons, allows Clergymen to be Guardians to Infants; and 'tis certainly a Secular Employment to dispose their Estates to the best Advantage.

But (b) *St. Cyprian* tells us, That Churchmen employing themselves in Secular Affairs have brought down many Persecutions

(2) 2 Inst. 4. (a) 11 Rep. 66. 1 Rol. Rep. 171. idem. (b) *Cyp. Epist.* among

among Christians; and he was so very angry with *Faustinus*, a *Presbyter* of the Church of *Carthage*, because *Geminus Victor* had made him Executor of his Will, that he suspended him from his monthly Allowance, and would not suffer any Prayers to be made in the Church in his Name; and yet I do not find that *Faustinus* either desired, or took upon him the Executorship.

But because the Church was then persecuted, and in a Time when there were so many Divisions amongst the Churchmen, that there were scarce enough to perform the daily Offices; therefore *St. Cyprian* was the more displeased at this Action, that he might discourage other Men from giving the *Presbyters* of his Church any manner of Opportunity to withdraw themselves from their Duty there.

Besides, it was his Opinion, that *St. Paul* had established a perpetual Rule against the worldly Employment of Churchmen; for speaking of them he tells us, *That no Man who warreth entangleth himself with the Cares of this Life.*

Paulus Samosetanus was the first Churchman of Note, who was employed in Secular Affairs; but when the Empire became Christian, 'tis reasonable to imagine, that Churchmen were in great Favour with Princes, and constantly in their Courts, where they had Secular Employments conferred upon them, as the Rewards for their Care in converting Infidels; but this was afterwards prohibited by Canons, and condemned by Imperial, Provincial, and Legantine Constitutions: And by the ancient * Ecclesiastical Laws, made by our *Saxon* Ancestors, Clergymen were excluded from being Lawyers, Merchants, or Soldiers; which seems to be one Reason why Tythes were allotted for their Maintenance, that they might wholly apply themselves to Study, to enable them to perform Divine Offices: And therefore by the † Canons of our Church, they are, among other Things, forbidden to give themselves to any base or servile Labour, under pain of Ecclesiastical Censures to be insisted on them with Severity.

My Lord Coke, who larded all his Discourses with *Latin* Sentences, seems to allude to this, when he told us, *That Clericus in oppido sicut piscis in arido*; which in other words is, That a Clergyman busied in Mean and Secular Employments is always out of his Element.

I grant, they might be *Arbitrators* among the People; and (c) *St. Paul* himself did not intend to exclude the Clergy from this Office, when he advised his *Corinthians* to refer their Differences to their Brethren; but the Reason was, because they should not prosecute one another at Law in the Courts of Heathens, which Reason ceased, when the Judges in the Temporal Courts became Christians.

* *Afric. Can. 6. Spelm. Con. Fol. 579.* † *Canon 75.* (c)
 † *Cor. vi.* N 4 'Tis

'Tis true, from the 19th Canon, made in the Council of *Eliebergis*, by which 'tis order'd, That *Presbyters* shall not leave the Places in which they served to follow Merchandize, it may be inferred, that they might Merchandize there where they ministered; for that they might do for their necessary Maintenance, and supply the Cure besides.

And this is agreeable to our Law; for tho' by the Statute 21 H. 8. cap. 13. Spiritual Persons are forbidden to Farm any Lands, either by themselves, or by any other Person, to their Use, under the Penalty of 10 l. per Month to the Queen and the Informer; or to buy any Cattel, or Merchandize, to sell again for Profit, under Penalty of treble the Value, to be divided as aforesaid; yet the same Law allows, that if they have not sufficient Glebe or Demesne Lands in Right of the Church, they may Farm more for maintaining their Families, and may buy Cattle to manure it.

'Tis to be observ'd, that the Clergy, since the Reformation, have been so conformable to this Law, that we read of but one Prosecution against any of them upon this Statute, and that was six Years after it was made, an * Action of Debt was brought against a *Vicar*, for farming Lands contrary to this Statute, who pleaded, *Non habuit seu tenuit terras, &c. ad firmam contra formam Statuti*: And upon this Issue it was held, that he might give in Evidence, he took Lands for the Maintenance of his Family.

Upon the whole Matter, since the Clergy are an Order of Men set apart to attend the Service of Religion, 'tis necessary they should have a settled and sufficient Maintenance to subsist, that they might not be diverted from their Duty by seeking their Living from such Advantages as might accrue by Bargains, Contracts, or any manner of Secular Employment; but yet they are not altogether prohibited in such Cases, but only from such Business which might be an Avocation from their Ministerial Duties.

And as this might be done for their Support; so the State in those Days was not depriv'd of their Service, especially of those, who, by natural or acquir'd Abilities, were prepar'd for it; for as soon as ever our *Saxon* Ancestors were converted to Christianity, the Clergy were call'd to their publick Councils, and their Advice was taken in the greatest Affairs of the Nation; for we read in those Days, that *Tam Clerus quam Populus* were summon'd to the great Councils; by the first of which Words, the Inferior Clergy, as well as the Prelates, and by the last, the Nobility, as well as the Commons, were comprehended.

And 'tis evident, that the Inferior Clergy of every Diocess sent Two Proxies of their Body to Parliament, who sate and

* 1 Lutw. 135.

voted with the Commons in one House, till the Reign of *Ed. 3.* And those who sent Proctors were at the Expence of their Attendance there, as the Counties were at the Expence of their Knight; for when the Abbot of *Leicester*, who was summon'd to Parliament, *Anno 26 Ed. 3.* had petition'd to be excus'd, because he held no Lands by any other Tenure than *Frank-almoigne*, this Petition could not be allow'd, unless he had agreed to contribute to the usual Charge of sending Proctors to Parliament,

And it farther appears by the Queen's Writs of summoning the Prelates to Parliament, that there is a Clause to warn the *Deans* and *Archdeacons* to appear in *Person*, and the Chapter and Clergy, by their Proctors, *ad consentiendum* to such Acts as shall be made by the *Common-Council* of the Kingdom; which Form is us'd at this Day, tho' the Inferior Clergy, thus summon'd, have not sat in Parliament for some Ages.

However, it seems past doubt that they had sat there; for in the Convocation which met, *Anno 1 Ed. 6.* the Lower-House petition'd the Bishops that some of the Inferior Clergy might be re-admitted in the House of Commons, according to the ancient Custom of the Nation, and according to the Tenor of the King's Writ to the Bishops.

The same thing was mov'd again about the latter end of Queen *Elizabeth's* Reign; and a Paper was deliver'd to her setting forth, That it did not appear by any History or Record how they came to be excluded the House, but it was thought it might be either by some angry King or ambitious Prelate.

'Tis true, my Lord of *Sarum* is not satisfy'd in these Particulars, but makes it a doubt, whether the Clergy were ever in Possession of any Right to be chosen Members of Parliament by Virtue of the Praemonitory Clause in the Writ of Summons.

But the learned Dr. *Atterbury* hath prov'd them to send Members to Parliament in the strictest Sense, and there is reason to believe that they sat there after the Reign of *Ed. 3.* for the Duke of *Gloucester* having obtain'd an Act; *Anno 11 R. 2.* by which he had the Government both of the King and the Realm; that Act was repeal'd, *Anno 21 R. 2.* at the Petition of the Commons, and by the Assent of the Lords Spiritual and Temporal, and Proctors of the Clergy, which were certainly part of that Parliament.

'Tis objected against this Opinion; that 'tis improbable the Inferior Clergy should be part of that Parliament, since they were never mention'd before or since to have any Share in the Legislative Power; and therefore some imagine those Proctors of the Clergy were the Lower-House of Convocation, which sat with the Lords and (d) Commons, till they sat apart, and

(d) B. H. R. 2 Pf. 49.

then the Clergy sate in Two Houses, viz. the Bishops in the House of Lords, as Barons by Tenure, and the Inferior Clergy in Convocation.

But the aforesaid learned (e) Doctor hath given us Instances of these *Proctors of the Clergy* sent to Parliament from 22 Ed. 1. to 19 H. 7. But withal he tells us, that some Time after the Conquest it was thought more regular and agreeable to the Canons, that the Inferior Clergy should attend the Parliament, not in one Body, as they did thro' all the *Saxon* Reigns to the Time of H. 3. but in Two Provincial Synods, and that accordingly they had so attended for near 400 Years, which seems to contradict what he alledg'd before; for we never read that they attended in such Synods as a separate Body, and at the same Time were represented in Parliament by their Proctors, as Members thereof.

Those, who cannot deny that the *Proctors of the Clergy* have sate in Parliament, have disputed what Power they had when met there; and particularly my Lord Coke (f) was of Opinion that they had no Votes; if so, they could not be Members, but only Assistants to Bishops.

But this could never be, for then they should have sate in the House of Peers; besides, the Clause in the very Writ of Summons intimates that they were part of the Parliament, as hath been observ'd before, and if a part of Parliament, they had certainly a Right to vote, or else they had been (as some will have them) a very insignificant part: It likewise appears by the Petition before-mention'd that they had such a Right, for otherwise there had been no occasion of a Petition to be restor'd to it.

But be it as it will, the Inferior Clergy were by degrees admitted into Provincial Synods, which at first consisted only of Bishops and Abbots; and now these Clergy are an essential part of the Convocation, for they have a Right to be summon'd thither, and when met they have the Freedom and Liberty of voting in any Debates, which may arise concerning, the Doctrine, or the Government, of the Church.

At first they usually sate with the Bishops in one House, and sometimes they retir'd by themselves, the better to form and collect the Debates upon any important Occasions, and to report their Resolutions therein.

But in the Reign of H. 4. they divided from the Bishops, and sate in a distinct House by themselves, but did not chuse a Prolocutor in many Years after; for we read that the famous Canonist *Lindwood* was the first *Prolocutor Cleri*, and he liv'd in the Reign of H. 7.

(e) Atterb. Append. 566. (f) 4 Inst. 3, 4.

Having given the Reader an Account of the word Clergy, and of the Privileges and Maintenance which they enjoy by Law, that they might with more Freedom attend the Service of God and his People, and therefore that they ought not to undertake any Secular Business, by which they may be diverted from a Work so great and necessary; tho' formerly they attended the Publick Councils of Kings, and were Members of Parliaments here, and when, excluded from thence, were admitted into Provincial Synods, and are now an essential part of our Convocation; I shall in the last place mention what sort of Persons the Clergy are required to be, in respect to their Behaviour; and I find by the * Canon, that they are to be sober in their Conversation; that they should not resort to Taverns, or Alehouses; or play at Cards, or Dice: And this is not only prohibited by that Canon, but by the Apostolical Canons, viz. that they should not frequent Publick Houses; nor play at Dice; and by the Council of *Eliberis*, 'tis Excommunication to do either: And *Justinian* forbids (g) Clergymen not only playing, but being present at it. This was likewise forbidden in the old Articles of Visitation here, and in several Diocesan Synods; The Punishment by our Canons is by Ecclesiastical Censures, according to the Quality of the Offence.

And this must be said in Honour of our present Clergy, that though several of their Benefices are very mean, yet we hear few have been punished by such Censures for any Misbehaviour, which was very common in the beginning of the Reign of *Car. 1.* when the High-Commission-Court was in Being; for we have Instances of several Clergymen cited before them for indecent Behaviour, both within the Church and out of it, viz. the Vicar of * *Strickon* in *Nottinghamshire* was cited before the High-Commission-Court at *York*, for sitting in the Church with his Hat on in the Time of Divine Service; and having a Controversy with an Inn-keeper of his Parish, he said in his Sermon, *That Christ was laid in a Manger, because he had no Money to pay for a Chamber*, but that was the Knavery of the Inn-keeper.

Another called a Man Fool in the † Church, and drank up all the Wine which was left after the Communion. So the Vicar of ‖ *Hallifax* put on a Leather-Apron and made Mortar, and afterwards took a Tythe-Pig out of the Sty, and gelt it himself; and many more Instances might be produced.

Lastly, If a Question should arise, Whether a Person is a * Clergyman or not? It shall be try'd in the Spritual Court, as where a Man libell'd in that Court to deprive a Clergy-

* Canon. 75. (g) Spelm. Council, 2 Vol. 192. 252. 295. 367. 450. * Litt. Rep. 152. † Litt. Rep. 154. ‖ Herley 3. * 2 Lev. 251.

man, setting forth that he was not a Priest, who moved for a Prohibition, suggesting, that at the Time of his Institution he was a Priest by Episcopal Ordination; to which the Defendant pleaded, that he was not a Priest by Episcopal Ordination at the Time of his Institution, and tendered an Issue upon that Point, to which the Plaintiff demurred: And it was argued, that a Priest or no Priest is triable by the Ordinary, but when it refers to a particular Time 'tis triable by the Country; besides, if no Priest, then the Presentation, and by consequence the Church is void, and such Voidance is to be tried by the Country.

But it was held, that where the Time refers to a Spiritual Account, as Institution is, there the Trial shall be in the Spiritual Court.

So if a * Layman should forge Orders, and thereupon get a Benefice, tho' Forgery is triable at Common Law, yet if the Offender is sued in the Spiritual Court to be deprived of his Living, the Courts at *Westminster* will not prohibit their Proceedings, because the Forgery related to an Ecclesiastical Matter.

Clerk of a Parish.

THE Bishop of *Worcester* tells us, that the Rectors of those Churches which were very well endow'd could the better maintain inferior Clerks, who might be assistant to them in the publick Service of the Church; and this was the true Original of *Parish-Clerks*, who were at first intended as Assistants to the Incumbents, and therefore were usually chosen by them.

They were call'd Clerks tho' not in Holy Orders, and their Business at first was to officiate at the Altar, and to say Masses for the Dead; and they had a competent Maintenance for this Service, by the Offerings made at those Altars where they officiated, for in those Days there were several Altars in one Church.

Since the Reformation there is but one in a Parish, who, by the † Canon, is to be chosen by the Minister; and this is to be signify'd by him on the next Sunday to the Parishioners.

The Person thus chosen must be 20 Years of Age, and one who can write and read, and also he must have a competent Skill in Singing; and such Clerks shall receive the usual Wages, for which they have Remedy in the Spiritual Court; but if they sue there for a certain (b) Quantity of Bread, due to them by Custom from every Parishioner at *Christmas*, a Prohibition shall go.

But where there is a Custom (i) for the Parishioners to chuse a Clerk, 'tis good, and the Canon cannot abrogate such Custom;

* 1 Lev. 138. † Can. 91. (b) 2 Rol. Abr. 286. (i) Cro. Car. 589. 2 Rol. Rep. 73. 481. 670. 2 Rol. Abr. 234. 2 Cro. 670.
and

and in such Case he may have a *Mandamus* to the Archdeacon to swear him; and if a Suit should be in the Spiritual Court to remove him, and to put in another chosen by the Parson, a * Prohibition shall go.

A † *Mandamus* may also be granted to restore him to his Place, if he be removed, and so it will for a *Sexton*.

Collation.

THIS is where a Bishop giveth a Benefice, which he hath either as Patron, or which came to him by Lapse: In the first Case he collates *jure pleno*; and some have been of Opinion, that in the other Case he collates *jure devoluto*, but that is a Mistake; for of common Right, Churches are under the immediate care of the Bishop; and the Right of the Presentation was only indulged to the Laity, to encourage them to build and endow more.

Now if the Patron neglects to Present, then this Right returns to the Bishop, in whom it was originally before the Patron could pretend to it.

'Tis true, if the Bishop should neglect to collate within Six Months after the Lapse, then the Archbishop hath a Right to do it; and this is properly *jure devoluto*, because he doth not collate as Ordinary, but as Superior, in whom a Power is vested to supply the Neglects of all Bishops within his Province; and if he should neglect, then it devolves to the Queen, who hath the Supreme Power to reform all the Defects of Government in any of Her Subjects.

But there must be a neglect in the Archbishop, before a Title can devolve to the Queen, which seems to be an Answer to the *Quære* in || *Dyer*, viz. the Master and Fellows of *Merton-Colledge* in *Oxon* were Patrons of a Living within the Diocese of *Durham*: The Incumbent died, and they did not Present within the Six Months; afterwards the Bishop of *Durham*, *Cuthbert Tonstall*, was deprived: And the Question before the Lord Chancellor at *Ely House* was, Whether it did belong to the Archbishop of *Tork*, or to the King, to Present?

And as a Bishop may neglect to collate, so it may happen that he may collate without a Title; but this wrongful Collation doth not put the true Patron out of Possession, for he may Present his Clerk, tho' the Collatee of the Bishop is Instituted and Inducted.

And in this respect, Collation differs from a Presentation; for if a Patron, who hath no right, Presents, and his Clerk is Instituted and Inducted, and hath quiet Possession for Six Months this is an *Usurpation*; and the true Patron shall never Present again, till he hath recovered his Right by a Writ

* *Rol. Abr.* 286. † 2 *Lev.* 18. || *Dyer* 87.

of Right of Advowson; but if a Bishop collates without a Title, that doth not make a *Usurpation* either against the Queen; or a common Person, for he is bound to receive either of their *Clerks* when presented; and, if he refuseth, a *Quare impedit* lies against him, and the reason is, because this Collation shall be intended only as a (*k*) Provisional Incumbency, that Divine Service may be performed till the true Patron presents.

Yet in the Case of *Coparceners* of an Advowson, where the *Clerk* of one of them is deprived, if the Bishop collates without giving Notice of the Deprivation to the other, and the Collatee dieth Incumbent, this wrongful Collation shall be a serving his Turn, because it was good against all but the true Patron; and he having neglected to remove that Incumbent, and suffering him to die in Possession, that Neglect shall not turn to the Prejudice of the other *Coparceners*.

But when once the (*l*) Bishop hath a Title to collate by Lapse, if the true Patron should Present his *Clerk* before the Collatee is Inducted, the Bishop is not bound to receive him; but if the Archbishop should collate within the Bishop's Six Months; and the Patron in such Case, should Present his *Clerk* to the Bishop, he is bound to receive him, because the Archbishop had wrongfully collated before his Time.

So where the Bishop had such a Title to collate, and neglects to do it, within Six Months after the Lapse, but afterwards collates *within* the Archbishop's Six Months, this shall be a Plenarty against the right Patron, and shall hinder him from Presenting, because the Bishop had once a Right to collate, and the *Usurpation* is not between him and the Patron, but between him and the (*m*) Metropolitan. So likewise where he had once such a Title, and both he and the Archbishop afterwards should neglect to collate, so that the Title is vested in the Queen, yet if the * Bishop should, after all this Neglect, collate, and his *Clerk* should die Incumbent, the Queen hath by this means lost her Presentation.

It hath been a Question, how these Six Months shall be computed, *viz.* whether according to 28 Days, or (*n*) *Kalendar* Months; and the better Opinion is, that where the Title accrues to the Bishop, to collate upon a Deprivation, he hath Six *Kalendar* Months after the Patron's Neglect.

Commendam.

THIS is a Dispensation, from the Supreme Power to hold, or take an Ecclesiastical Living, *Contra jus positivum*; and, according to the *Canonists*, this may be done upon a double Account.

(*k*) 1 Inst. 344. b. (*l*) 2 Rol. Abr. 367. * 2 Lutw. 1085.
(*m*) 2 Rol. Abr. 368. (*n*) 2 Cro. 141. 166. In

In utilitatem } *Ecclesia*
 &
 Commendatorii.

That which was for the Benefit of the Church is call'd *Semestris*.

That which is for the Benefit of the Party was Twofold.

Retinere } And that was *Intermedia*,
 &
Capere } And that was *Perpetua*.

The *Commenda Semestris* was without any Respect to the Benefit of the Commendatory, for it was only a Provisional Act of the Ordinary, or of the Chapter, *Sede vacante*, in granting the Profits to a Parson to supply the Cure for Six Months, in which Time the Patron was to Present his Clerk; and this, my (o) Lord *Hobert* tells us, did arise out of a natural Equity, that the Church should not be without a *Pastor*, during that Time.

Now all Dispensations beyond the Six Months were only permissive at first, and granted to Persons of Merit, but such were granted here long before the Conquest; for *Oswald*, who was Archbishop of *York* in the Reign of King *Edgar*, held the Bishoprick of *Worcester* in *Commendam*; and probably the Reason of such *Commendams* may be thus:

Before there was any Division of Parishes, the Bishopricks of this Nation were liberally endow'd, and the Revenues of the Church were brought into the common Treasury, which was always in the *Cathedral*, where the Bishop presided; and these Revenues were distributed by him amongst his *Presbyters* or *Clergy*, as he thought convenient, reserving a competent Share for himself.

Afterwards when the Nation was divided into Parishes, and particular Districts were allotted to Rectors, the Bishops parted with a Share to those Rectors; and by this Means their Revenues were considerably abated, so that the *Pope* thought it necessary to grant Dispensations *In Commendam*, for the better Support of the Honour and Dignity of the Bishop.

And by this the Patron had no Injury, because the Right of Patronage at first was a Concession from the Church; and it seem'd reasonable that the *Pope*, who at that Time was the Head of the Church, might in Cases of Necessity grant such Dispensations for a Time.

But this was an Usurpation upon the *Crown*; for tho' by the *Lateran Council* Pluralities were condemn'd, yet the King might grant Dispensations *In Commendam* to hold several Benefices

(o) Hob, 144.

together, and this he might do at Common Law; therefore the Statute 25 H. 8. which takes away that Usurpation, doth reveest that Right in the Crown.

2. There is a *Commenda Intermedia*, and that is between a *Commenda Semestris*, and for Life; and 'tis *Retinere* the Benefice for one or more Years, which is the Queen's Dispensation to prevent an Avoidance, when She promotes the Incumbent to be a Bishop.

This *Commenda Retinere* must always be before Consecration, for afterwards it comes too late, because the Benefice is then absolutely void; and therefore it was held that Cardinal Beaufort's Dispensation *Retinere* the Bishoprick of Winton was void; because it came after he was made a Cardinal.

But Cardinal Woolsey's Dispensation *Retinere* the Archbishoprick of York was good; because it was before he was made a Cardinal.

Such a Dispensation, before Consecration, was always allow'd to the Pope before the Reformation, it was the Ecclesiastical Law of the Land at that Time; and by the Statute 25 H. 8. cap. 21. the Archbishop may now dispense as the Pope did before; but such Dispensation must be confirm'd by the Queen.

This *Commenda Intermedia* is sometimes for Three or Six Years; thus (q) Parkhurst, Rector of Cleve in Gloucestershire, being made Bishop of Norwich, obtain'd a Dispensation Anno 7 Eliz. to hold his Rectory for Three Years.

So (r) Doctor Thornbury, Dean of York, being made an Irish Bishop Anno 36 Eliz. got a Dispensation *Retinere* his Deanry in *Commendam*; and Doctor Milbourn, Rector of Sevennoke, being made Bishop of St. David Anno 4 Jac. had a Dispensation *Retinere* his said Rectory in *Commendam* for a Year.

Such a Commendatory Dean retains his old Title; and all Confirmations and other Acts, which he doth as Dean, are as good in Law, as if he had never been made a Bishop.

So Anno 22 Jac. in the Case between (s) Woodley and the Bishop of Exon, &c. the Incumbent obtain'd a Dispensation to hold his Benefice in Devonshire for Six Years in *Commendam*; being made a Bishop in Ireland.

And in a late Case (t) Doctor Tennison, the present Archbishop of Canterbury, being Rector of a new Parish made by Act of Parliament, and being afterwards made Bishop of Lincoln, obtain'd a Dispensation *Retinere* his said Rectory in *Commendam* for Seven Months.

It hath been objected in some of these Cases, that when an Incumbent is made a Bishop, a *Commenda Retinere* for Months or

(q) Dyer 233. (r) Latch. 11. Jones 158. (s) 2 Cro. 691.
(t) Cases adjudg. 164.

Years, tho' granted before Consecration, is a void Dispensation, because upon the very Promotion his Benefice is void by the Common Law; and all the Title which he hath to it is by this *Commenda Retinere*, which cannot be for Years, because an Incumbency is a Freehold which must be for Life; and cannot be diminish'd in Point of Estate; besides, 'tis always obtain'd by an Institution and Induction; and as the Nature of a Freehold could not be alter'd by the Pope's Dispensation, before the Statute 25 H. 8. so it cannot now be alter'd by the Queen.

The Answer to this Objection is, That a Rector of a Church, who hath a Dispensation to hold it before he is consecrated Bishop, doth, by Virtue of that Dispensation, continue Incumbent after his Consecration; for if the Patron should present, supposing the Church to be void, and his Clerk should be instituted and inducted, yet a *Writ of Spoliation* lies against him by that very Incumbent who is made a Bishop; which Writ no Man can have, but he who is a perfect Incumbent.

'Tis for this Reason, that if a Bishop hath a Dispensation (u) *Retinere* his former Benefice in *Commendam* for Three Years, and he resigns it within that Time, the Patron shall present, and not the Queen, because the Avoidance is not by Cession, but by Resignation.

So it is if the Dispensation had been *Retinere* his Benefice for Life, the Patron shall present after the Death of the Bishop; by both which Cases it plainly appears, that the Bishop still continues Incumbent on his first Benefice, for otherwise the Avoidance would be by Cession.

So a (*) Commendatory Dean may confirm a Lease, which he could not do if he did not still continue Dean.

And as to a Temporary Incumbency without Institution, it may be altogether as good as in the Case of an Appropriation, by which the Church is given for ever, *Absque aliqua Presentatione, Inductione, sive Admissione alicujus Incumbentis ad eandem*; by which Words 'tis allow'd that the perpetual Incumbency passeth without Institution.

And if a *Commenda Retinere* for a few Years is granted by the same Power, there can be no Reason given but it must be as good in Law.

But we have Instances of such Dispensations *In perpetuum*, and they stand upon the same Reason with Appropriations, which were the ancient Endowments of some Bishopricks; as the Rectories of *Eastmean*, and *Hableton* in *Hampshire*, are appropriated *Ad Mensam* of the Bishop of *Winton*.

Then as to a Freehold, 'tis true, the Nature of it cannot be alter'd by a Dispensation; but certainly the Profits of the Church may be lawfully assign'd for a Term of Years, and that is the Case of a *Commenda Retinere*, which in Truth is not

(u) Dyer 228. (*) Jones 158. Latch. 31.

properly a *Commenda*, because a Man cannot be commended to that which is his own; 'tis rather a legal Assignment of the Profits for a certain Term of Years or Time, to a particular Person, and for a certain Purpose.

Besides, 'tis very reasonable, that a *Commenda Retinere* for Years should be good, because such a Dispensation doth not alter the Estate which the Incumbent had before, but continues it in him.

'Tis true, if the Property of a Living is chang'd, and a new Right obtain'd, either by Institution or Induction, upon a Presentation, or by a Grant of an Appropriation; in such Cases the Limitation for Years cannot abridge the legal Estate; for, notwithstanding such Restriction, the Presentee or Grantee may enjoy it during Life; and the Reason is, because 'tis against the Nature of such Acts to be Temporary; they must enure, and be perfect as they may be, that is, for Life; or for ever: 'Tis likewise a Confirmation for a Year, which must enure for ever, because 'tis against the Nature of such a Deed to abridge the Estate confirm'd.

A *Commenda* is likewise *Perpetua*, that is, for Life of the Incumbent; and the same Objection may be made against such a Dispensation, viz. That the Pastoral Care is not committed by Institution and Induction, according to the Forms prescribed by Law; but these Dispensations are allow'd to be good.

The *Canonists* allow, that Necessity is the most reasonable Ground for such *Commendams*; which if true, then 'tis certainly a good Argument for such Dispensations here, because we have some very small Bishopricks; and there seems to be an absolute Necessity of supporting their Dignity by this Means.

The next is a Dispensation, *Capere in Commendam*; and this differs from *Retinere*, for that is only to hold what was his own before, but this to take what belongeth to another.

And this seems to be injurious to the (y) Patron, and void even by the Canon Law without his Consent, because it deprives him of the Benefit of Presentation, which a Dispensation in *Commendam Retinere* doth not, for the Avoidance is by the Act of the Queen; and 'tis more reasonable that Her Authority should extend to continue the Person promoted in the same Benefice he had before, than to give him any Power to take a new one.

'Tis true, during the Time of such Incumbency there is *Damnum*, but 'tis *Absque injuria* to the Patron; for it can be no Prejudice to him that hath presented a Clerk, who was worthy to be made a Bishop, and to whom the Queen had granted a Dispensation, notwithstanding his Promotion, to continue Incumbent in the same Benefice during his Life, or for a shorter Time, if She thinks fit; and when that is determin'd,

or the Person dies, then the Patron hath Power to present again.

There have been some Dispensations of this Nature; as in the (2) Bishop of *Ossory's* Case, who had a Faculty *Perpetua Commenda titulo adipisci occupare & retinere unum vel plura Beneficia, curata vel non curata, sui vel alieni juris Patronatus*, then vacant, or which should afterwards be so, not exceeding the yearly Value of 40 l.

At the Time of this Grant there was a Vicaridge in his Diocess which was full; and about Five Years afterwards the Vicar died, and the Bishop collated himself to it by Lapse.

It was objected against the Legality of that Dispensation, that the King could not make such a Grant, because the Pope could not do it before the Statute; for if a Layman was Patron, then it was not good without his Consent; and if a Spiritual Person was Patron, there was always in such Grants a *Non obstante* of his Right of Patronage, and a particular Clause to the Archdeacon, to put the Commendatory in Possession of the Benefice *Cum acciderit*; all which was omitted in that Grant.

But it was agreed that a *Capere in Commendam* might be good, where the Right of the Patron was not prejudic'd, as if he suffer a Lapse.

In *Colt* and *Glover's* Case the Dispensation was *Retinere in Commendam* one Benefice, which the Incumbent had before he was consecrated (a) Bishop of *Litchfield*; and *Capere in Commendam propria Autoritate unum aliud vel plura*, that is, as many as he could get with Cure, or without, provided they did not exceed the yearly Value of 200 Marks, and to enjoy the same so long as he should live, and be Bishop of that See.

Justice *Doderidge* held this *Commendam* to be illegal, because it was *Capere plura Beneficia*, without any Limitation either of the Number or Value; which must be a Mistake, for it was restrained to the yearly Value of 200 Marks.

My Lord *Hoberi*, in his Argument on the same Case, condemns this conditional *Commendam*, viz. so long as the Commendatory should continue Bishop of that See, because the Incumbency ought to be for Life, and could not be diminish'd; he allow'd it might be good in the *Retinere* for a Term of Years, but not in the *Capere* without the Patron's Consent; and the Reason may be, because in the one Case an Avoidance is prevented by such a Dispensation, but in the other the Church must be absolutely void; and therefore a *Commendam Capere* a void Benefice deprives the Patron of one Turn at least.

In these Two last Cases, all the most material Objections against these Dispensations are made and answer'd.

(2) Davis 68. (a) Hob. 140. Moor 898.

1. That a Bishop cannot be Incumbent of a Living in his own Diocese, because he is a Sovereign there, and cannot be at the same Time subject; that the Office of a Bishop and Vicar are incompatible, and cannot consist in one Person.

'Tis true, when a Person is a Subject, 'tis a Contradiction to say he is not; but such Subjection may cease when the Vicaridge is in the Bishop himself, as a Deputation ceases when the principal Officer executes the Office himself.

Neither is the Office of a Bishop and a Parson inconsistent in one and the same Person, for the Bishop hath the Cure of Souls throughout the whole Diocese; and tho' the Parson hath that Cure in a particular Parish, yet 'tis not exclusive of the Bishop, because he hath a general Charge over the whole.

2. There is another Objection, That a Bishop ought not to have a Dispensation to hold a Benefice *In Commendam* in his own Diocese, because he cannot visit himself.

But this Objection is easily answer'd, viz. tho' he cannot visit himself, he may be visited by the Metropolitan.

Besides, there would be no Inconveniency if in such Case there was no Visitation at all, because the Nature of a Visitation being only to reform Abuses, it cannot be presum'd a Bishop would be guilty of any Fault, for which he ought to be visited, when the Law hath intrusted him with the general Power to reform all Abuses in his Diocese.

But in the Case of (b) Doctor Eades and the Bishop of Oxford, which was a Dispensation in *Commendam Retinere*, as long as he should live and continue Bishop of Oxford, and that was held good; for if a *Commendam Retinere* for Life is good, as certainly it is; if 'tis good also for Years, what Reason can be given why a Dispensation for Life, or as long as a Man shall continue Bishop of such a Place, should not in like manner be good?

Commissary.

THIS is a Person deputed by the Bishop's Grant to exercise Ecclesiastical Jurisdiction in particular Cases, and in such remote Parts of his Diocese, from whence the People cannot conveniently come to attend his Consistory Court; and for this Reason a Commissary is call'd by the Canonist *Officialis foraneus*.

He is an Officer created upon Necessity; for when the Bishops were bound to attend the publick Services of the Kingdom, by Reason of their Tenures; they at first deputed Chancellors to hear those Causes wherein they had Jurisdiction.

Afterwards when those Causes encreas'd, and by various Canons, Distinctions and Decisions, the Ecclesiastical Judicature was made more intricate; it was almost impossible for Chancellors to determine all those Causes in the Consistory Courts; and

(b) Vaugh. 18.

therefore it was necessary for the Bishop, as well for the Ease of the People, as for the Dispatch of such Causes in particular Places in his Diocese, to substitute a (c) *Commissary*; and this he may do in every Archdeaconry, or he may appoint one throughout the whole Diocese.

He is usually made by the Bishop's Grant, confirm'd by the Dean and Chapter; and when that is done, he may enjoy the (d) Office for his own Life, and not only for the Life of the Grantor; tho' that was a Question formerly, whether a *Commissary* of a Dean should hold his (e) Office after the Death of the Grantor, and against his Successor?

Then as to the *Person*, by the (f) 37 H. 8. a *Layman*, being *Doctor of Laws*, may be made a *Commissary*; which Statute is not restrictive, that no other Person shall be a *Commissary*, but a *Doctor of Laws*; for (g) *Anno 35 Eliz.* a Batchelor of Laws was made a *Commissary*, and he granted Administration; and it was held good.

And not long afterwards the Ecclesiastical Canons were made, by which 'tis ordain'd, that a *Commissary* must be 26 Years old, and one who is learn'd in the Civil and Ecclesiastical Laws; that he must be either a Master of Arts, or Batchelor of Law; and that before he is admitted to his Office he must take the Oath of Supremacy, either in the Presence of the Bishop, or in Court, and subscribe the 39 *Articles*; and must likewise take an Oath that he will, to the best of his Understanding, well and truly execute his Office, without respect or favour of Reward.

He differs from a *Chancellor* only in respect of Jurisdiction, and the Extent thereof; for they are both made by the Bishop's Grant, only the *Chancellor* hath a general Authority in Ecclesiastical Causes over the whole Diocese, but a *Commissary* is limited to a certain Place.

When I mention that a *Commissary* is made by the Bishop's Grant, I would not be understood that 'tis always so; for sometimes, and in some Places, he may be made by a *Prebendary*: As for instance, † Dr. Pocklington, *Prebendary of Lincoln*, having a Peculiar in *Oxford*, made a Lease of it for Three Lives together, with all Profits, Commodities and Advantages, thereunto belonging: The Lessee granted the Office of *Commissary* to one, and the *Dean and Chapter of Lincoln* to another; and the Court was divided whether such Lessee had Power to grant this Office, because it was annex'd to the Spiritual Function of the *Prebendary*, which he could not transfer to his Lessee.

(c) 1 Rol. Rep. 435,
(f) Cro. Car. 258,
‡ Lev. 125,

(d) 10 Rep. 61.
(g) Cro. Eliz. 315,

(e) Noy. 153.
† Rain 88,

Common-Prayer.

SINCE the common Necessities and Duties of all Christians are the same, those, who conform to the establish'd Religion here, have agreed upon a fix'd and stated Form of Prayers, Praises and Thanksgivings, to be us'd in our publick and solemn Devotions, which are contain'd in a Book call'd, *The Book of Common-Prayer*.

And altho' some think it unlawful to pray to God in set Forms and Words, yet those who are of that Opinion do not pretend to Inspiration; but they affirm, the Holy Spirit doth help them in their present and sudden Conception, by which they are more earnestly excited to implore the Blessings of Heaven, and Forgiveness of their Sins.

I will not enter into any Dispute here concerning this Matter, having never yet met with any solid or convincing Argument, to determine why the Spirit of God should not be assisting to us, when we pray for a Thing in a Form of Words, as well as when we pray for the same Thing in various and changeable Words, according to our Fancies and Emotions.

Neither shall I discourse of the Antiquity of common Forms of Prayer, which hath already been done by Men of Learning, and brought down to us from the Time of the Apostles, thro' all Ages of the Christian Church; they have shew'd us, that there was never any Church or Society of Christians till of late, that held it unlawful to pray by a Common Form; they have told us out of the *Bibliotheca Patrum*, that there was a Liturgy in the Church of *Alexandria*, which is attributed to St. *Mark*, who was the first Bishop there; which, tho' intermix'd with some new and unwarranted Additions, yet those do not destroy the Antiquity of the Original.

They have told us likewise, that St. *James* himself compos'd a *Liturgy*, which he left to the Church of *Jerusalem*, of which he was also the first Bishop; this is affirm'd by *Sixtus Senensis*, and by the Fathers of the Third Council, assembl'd at *Constantinople*, under *Justinian* the Younger, at a Place in his Palace, call'd *Trullo*, about 680 Years after the Birth of *Christ*; and the like hath been shew'd us in respect to other Churches, who had their Liturgies enlarg'd by the Prayers of great Men; such as St. *Basil*, St. *John Chrysostom*, &c. in the *Eastern Churches*.

'Tis enough for me to shew, that here in *England*, in the Time of the Saxons, the Council of *Cloveshoe* was held under *Cuthbert*, Archbishop of *Tork*, by which Council the Priests were requir'd to learn the *Lord's-Prayer* in *English*; and by the (b) Canons of King *Edgar* and *Egbert*, they were enjoin'd constantly to use it in their Churches: And it will not be deny'd, that in the *Roman Church* there were always Forms of Prayer, as may be seen in

(b) Can. Edg. 2 Can. Edg. 45.

their *Missals, Breviaries, Rituals, Pontificals, Manuals, Rosaries, &c.*

But the *Common-Prayers*, which are now us'd in the Church of England, were by the several Gradations following thus establish'd.

Those Offices mention'd before, and which were us'd in the Church of *Rome*, being so many, and every Religious Order having likewise some particular Rites and Services adapted to themselves, and to be perform'd on the Saints Days, which belonged to their respective Orders, it was a very difficult Thing to understand in what Manner to officiate.

In the *South Part of England* the Offices were after the Use of *Sarum*; in the *North* they were after the Use of *York*; in *South-Wales* after the Use of *Hereford*; and in *North-Wales*, those after the Use of *Bangor* were generally receiv'd; and in *Lincoln* and other Places, there were proper Offices appointed to be us'd; and when any Prelate was made a Saint, there were Collects and particular Forms us'd for him in his Diocess.

And all the Offices were in *Latin*, and so was the Liturgy itself, which was us'd in the Churches before the Reformation, and which was establish'd by the Laws of the Land, and the Canons of the Church.

This Liturgy was compos'd of some Forms of Prayer, us'd in the Primitive Church, and, as before-mention'd, of many more Forms of a later Date, accommodated to the Superstition of these Times, in which they first appear'd.

In the Reign of *H. 8.* *Archbishop Cranmer* was the first Prelate who endeavour'd to reform these Abuses, and to get the Prayers of the Church perform'd in the *English Tongue*, that all the People might join with the Priest; but as to this Matter, nothing more was done in that Reign, than to compose a Book call'd the *Primer*, containing the *Lord's-Prayer*, the *Creed*, the *Ten Commandments*, and *Morning and Evening Prayer*, in *English*; and not long after the Litany was publish'd in the same Tongue, but something different from what now it is.

In the Reign of his Son and Successor, *viz. Anno 2. Ed. 6.* the *Protector* and the rest of the King's Council thought it expedient that there should be one uniform Order of publick Worship throughout the Kingdom; and in order to prepare and compose such a Form, there was a Committee of particular Divines appointed, *viz. The Two Archbishops, 16 other Provincial Bishops, and Six Doctors of Divinity*, to examine and reform all the old Offices of the Church.

These Persons met at *Windsor-Castle*, and the first Thing they did, was to examine the Manner of Administration of the *Eucharist*; of which I shall give an Account in another Place, under the Title *Sacrament*.

But to proceed, The *Committee*, upon Examination of these Offices, found them so Superstitious, that they rather resembl'd the Rites of Heathens than Christians; and thereupon they rejected every Thing which was not warranted by Scripture, and reduc'd other Matters to their primitive Purity.

In the compiling this Book the Reformers began with the Morning and Evening Prayers, which they put in the same Form we now have, only the Confession of our Sins, and the general Absolution to Penitents were omitted.

The Communion Service was likewise the same as 'tis now, only the Ten Commandments were not read in that Service.

And because Religion was clouded with many Ceremonies, therefore they rejected all such which had been abus'd by Superstition, and retain'd those which were decent, and which tended to move our Affections by some apt and good Significations; and they prefix'd a *Preface* concerning such Ceremonies, which is the same now printed before the Book.

I think no Man will affirm, that any of them are either unlawful in themselves, or against any Positive Law of God; they are agreed to be Matters merely indifferent, and if so, we ought to be obedient in Conformity to the Civil Magistrate, who has enjoin'd us to observe them.

I know the usual Excuse is *Conscience*, and that we should not trouble the weak Minds of our Brethren about Things indifferent; and we are told, *that he who woundeth a weak Conscience about such Things sinneth against God.*

But those, who have been the greatest Advocates against the Punishment of Men, for disobeying the Laws of the Magistrate in *Things indifferent*, do allow that *Conscience* in such Cases must be *Sine dolo*, and that Disobedience must not be countenanc'd in Contempt of that Authority by which these Laws were establish'd; and these *Canonists* who have given the greatest Latitude to *Conscience*, by asserting, that *Quamquam Erronea & Scrupulosa sequenda est*; yet they tell us how that must be understood, *viz. Si non potest de jure Informari.*

Now, whether some Persons refuse to conform to these Ceremonies *Dolo malo*, whether they wilfully stand in Contempt of that Authority which enjoin'd their Observance, and whether such Persons may be rightly inform'd of the Lawfulness of them, may be proper Questions for the Reader to consider, but not for me to determine.

I shall proceed to shew that the Alterations, which were made in the publick Offices of Worship, created great Heats amongst the People, which were excited chiefly from the Pulpit; and therefore Preaching was prohibited for a Time, by any Person not licens'd by the King or his Council, or by Archbishop *Cranmer*.

Afterwards the *major* Part of the said Committee fram'd a Bill, which they brought into the (i) House of Peers on the 9th Day of *December*, and which lay before them a long while; for Eight of the 16 Bishops, who were of the Committee, and Three Temporal Lords protested against it; by which they shew'd their Unwillingness to make any Alterations, but they were resolv'd to obey when it came to be enaſted into a Law.

The Preamble of this Bill was, That there had been different Forms of Prayer and Service, &c. That the most effectual Endeavours could not divert the People from their old Customs; and that therefore there might be an uniform Way of Service, &c. The King, by the Advice of the Lord Protector, and his Council, had appointed the Archbishop of *Canterbury*, and other learned Bishops and Divines (having respect to the most pure Christian Religion, and to the Practice of the Primitive Churches) to make one convenient Order and Rite of *Common-Prayer*, which they had done by the Assistance of the Holy Ghost, and deliver'd to the King, in a Book entitl'd, *The Book of Common-Prayer and Administration of Sacraments, &c.* wherefore the Parliament, considering the said Book, most humbly thanked the King for his Care; and did enaſt, that the said Form of *Common-Prayer*, and no other, should be us'd thro' *England*, at *Whitsun-tide* following.

But because some Things were contain'd in that Book, which shew'd a Compliance to the superstitious Humours of those Times; and some Exceptions being made to it by precise Men at home, and by *Calvin* abroad; therefore Two Years afterwards it was review'd, in which *Martin Bucer* was consulted, and some Alterations being made in it, which consisted in adding some Things, and leaving out others.

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| The Additions were, viz. | { | A general Confession of Sins to the Daily Service. |
| | | A general Absolution to the Penitent. |
| | | The Communion to begin with reading the Ten Commandments, the People kneeling. |

A Rubrick concerning the Posture of Kneeling, which was afterwards by the Statute 3 *Eli.* order'd to be left out, but is now again explain'd as it was *Anno 2. Ed. 6.*

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| Left out. | { | The Use of Oil in Confirmation and Extreme Unction; Prayers for Souls departed, and what tended to a Belief of the Corporal Presence of Christ, in the Consecration of the Eucharist. |
| | | |

(i) E. H. R. 2 Pl. 93.

This was approv'd by *Martin Buter*, who was of Opinion, that every Thing was clearly then according to the Scripture; and *Ayloffe*, the *Scotch* Divine, translated it into *Latin* for his own Use.

And tho' Political Prudence was join'd with Christian Piety in composing this Service-Book, yet the People were not satisfied with it, but rais'd several Rebellions in many Places of this Kingdom; the most formidable was in *Devonshire*, and thither the Lord *Russel* was sent by the *Protector* to subdue them; but before they engag'd there was a Treaty upon Articles, one of which was, That the new Service should be laid aside, and the old Service to be us'd again in *Latin*: And some of our Historians tells us, that the King, to appease that Rebellion, told the People that it was no other than the old Service in *English*.

Afterwards, *Anno* 5 & 6 *Ed.* 6. a Bill was brought into the House of Peers to enjoin Conformity to this new Book, with those Additions and Alterations; and by which the People were enjoin'd to come to Prayers upon Pain of Church Censures, which Bill pass'd into a Law in the same Year.

But upon the Death of that King, which happen'd soon after, the *Common-Prayers* were laid aside, for the Statute 5 & 6 *Ed.* 6. was repeal'd by an Act made 1^o *Marie*; and some of these Divines, who had been the chief Promoters of it, fled beyond Sea, where at *Frankford* there happen'd a Contention amongst them; for Some were of Opinion, that they should accommodate the Worship of God conformable to the Usage of the People there, and nearer to the Forms of *Geneva*; so that all might be united in one Way of Worship.

Whittingham and *Knox* engag'd in this Affair, and procur'd their Friend *John Calvin* (who was very famous in those Parts) to write against the *English* Service; which he did, and declared, that in it there were many *Tolerabiles Ineptia*, as he call'd them.

But this Investive being not sharp enough; for it seems tho' there are *Ineptia* in it, yet they were *Tolerabiles*; therefore he was requir'd to declare his Opinion a little plainer, which he did, by calling the Forms of Prayer in that Book, *Reliquias Papisticae facis*; when the same Man, not above Eight Years before, had wrote to the *Protector*, to encourage him in the Reformation; and in that very Year, when the *Common-Prayer* Book was first compil'd, and 'tis very probable that he had seen it; for in his Letter he approv'd set Forms of Prayer, and had not then found out those *Ineptia* & *facis*, which afterwards appear'd to him.

Some other of our Divines at *Frankford* were of Opinion, that since they had us'd that Form in *England*, and some People were then under Prosecution for it there; for that Reason they ought to use it still, otherwise it would be a Contempt to them and their Sufferings.

But

But upon the Death of Queen *Mary* it was again appointed by 1 *Eliz.* to be us'd by every Minister, however, not as it was before; for having been review'd by Mr. *Whithead*, Chaplain to the Queen's Mother; by Doctor *Parker*, afterwards Archbishop of *Canterbury*; Doctor *Grindall*, afterwards Bishop of *London*; Doctor *Cox*, afterwards Bishop of *Ely*; Doctor *Pilkington*, afterwards Bishop of *Durham*; Doctor *May*, Dean of *St. Pauls*, who was one of the former Committee; Doctor *Bill*, Provost of *Eaton*; and Sir *Thomas Smith*; some Additions were made to it.

Viz. { Certain Lessons for every Sunday in the Year; some Alterations in the Liturgy; Two Sentences added in the Delivery of the Sacrament, intimating to the Communicants, that Christ is not corporally present in the Elements, &c. The Form of making Bishops, Priests and Deacons, was likewise added.

And great Care was taken that nothing should be in it which might give the Papists any manner of Offence; therefore the following Sentence, which was in King *Edward's* Litany, was left out, *viz.* *From all Sedition and privy Conspiracy, from the Tyranny of the Bishop of Rome, and all his detestable Enormities, &c.* which last Words were wholly omitted, and continue so ever since.

This Service-Book, being thus enacted to be read in all Churches in *England*, was us'd in the Queen's Chappel soon afterwards, *viz.* on the 12th of *May*, and on the *Wednesday* following in *Paul's* Church, where Dr. *Grindall* preach'd before the Privy-Council, several of the Nobility, and a great Assembly.

There were some Alterations made in the Reign of King *James*, but these were in the Rubrick only.

And as for the Additions of Thanksgivings, at the End of the Litany, the Prayer for the Queen and Royal Family, which were not in the last Book; those were added by the Authority of that King's Commission, and are still in Force by Virtue of his Proclamation; and so are the Prayers for the Inauguration of our Kings and Queens, and for the Gunpowder-Treason.

This Book, being thus compos'd, was at first thought to be adapted to those common Principles of Christianity; and was then so generally esteem'd, that *Parpatio*, Abbot of *St. Saviour's*, who was sent hither by *Pius IV.* with Letters to the Queen, had Authority from the said Pope, to offer it should be confirm'd by him; and for the first Ten Years of that Queen's Reign, the Papists did constantly attend the Service in our Churches.

This we have from no less Authority than my Lord *Coke* himself, who, in his Speech against *Garnett*, condemn'd for the Gun-

powder-Treason, told him, that in the Beginning of the Queen's Reign he had observ'd *Bedingsfeild*, *Cornwallis*, and several others of that Communion, constantly to come to our Churches.

'Tis true, he was then but a very young Man; but the Queen her self tells us the same Thing in her Instructions to Secretary *Walsingham*, viz. That the Chief of the Party, in the beginning of her Reign, did frequently come to Divine Service in the Churches.

But when Pope *Pius V.* had by his *Bull* depos'd the Queen, then the *Roman Catholicks* did generally withdraw from our Churches, and have so continu'd ever since.

This happen'd *Anno 10.* of the Queen, and about Three Years afterwards a Book was publish'd, entitl'd *An Admonition to the Parliament*; it was written chiefly against the Government of the Church by Bishops, and to deprave the Book of *Common-Prayer*. I only mention this to shew what Zeal there was against the Reformation, not only by the *Roman Catholicks*, but by those who were then call'd Puritans; that Book was answer'd by Dr. *Whitgift*, and in the very next Year a Proclamation came forth, for the better Observation of the Book of *Common-Prayer*.

And as the *Papists* conform'd themselves to this Worship, so our *Norih Britains* had it in more Reverence formerly than of late; for *Buchanan* himself tells us, that they enter'd into a general and publick Subscription to observe *Cultus & Ritum Religionis cum Anglia Communes*.

Upon the whole Matter, inasmuch as the observing a *Form* or *Directory* is not of the Substance of *Prayer*, but a mere Accident or Circumstance belonging to it, and left to the Determination of our first Reformers; therefore they compil'd this Book, which was afterwards establish'd by Law; and 'tis observable that it was in the same Year in which the Queen's Supremacy was recogniz'd; by which Law several Punishments are to be inflict'd, both on Ministers and others, for not using or depraving it.

If a Minister is convicted by Verdict, or Confession, or notorious Evidence of the Fact of *refusing to use it, or using any other Form, or depraving it*.

The first Offence in such Case is Forfeiture to the Queen, which of his Benefices She shall chuse; and this is by Statute 2 & 3 *Ed. 6.*

If benefic'd, { But by Statute 1 *Eli. 2.* for the first Offence he loses all his Spiritual Livings for a Year, and by both he is to be committed for Six Months; for the second Offence he shall be *depriv'd Ipso facto*, and be committed for a Year; and for the third Offence he shall be *depriv'd*, and committed for Life. If

- If not benefic'd, { 1. Offence, Imprisonment for 6 Months; but by the Statute 1 *Eliz.* cap. 2. for 12 Months.

2. Offence, Imprisonment for Life.

But my Lord Coke was of Opinion, that those Parsons, who did not use the Book of *Common-Prayer*, or deprave it, might be punish'd by Admonition, Excommunication, Sequestration, or Deprivation, in such manner as had been us'd in like Cases by the Queen's Ecclesiastical Laws; tho' the Statute 1 *Eliz.* had not inflicted any Punishment for those Offences; and so in the Resolution in *† Cowdry's Case*, who *Anno 31 Eliz.* was cited before the Bishop of London and other Ecclesiastical Commissioners, and convicted upon his own Confession, for Preaching that the Book of *Common-Prayer* was a *vile Book, fye upon it*; it was objected, that it being his first Offence, he could not be depriv'd for it by the Statute 1 *Eliz.* because that appoints Deprivation for the second Offence; but it was answer'd, that the Statute did not abrogate the Ecclesiastical Jurisdiction without negative Words; and by an express Proviso the Jurisdiction of the Bishop was sav'd, so the Deprivation was good.

If any other Person shall be convicted (as aforesaid) by *Songs*, or otherwise to have *deprav'd* it; or to procure a Minister to say any other Form, or to interrupt him in saying that Service;

First Offence. *Per Statute 2 & 3 Ed. 6.* he forfeits 10 *l.* to the Queen; and if not paid within Six Weeks after Conviction, then to be committed for Three Months; but by the Statute 1 *Eliz.* he forfeits 100 Marks to the Queen; and if not paid as aforesaid, shall, instead thereof, be imprison'd for a Year.

Second Offence. *Per Statute 2 & 3 Ed. 6.* forfeits 20 *l.* to the Queen, and if not paid (*ut supra*) Imprisonment for Six Months without Bail; but by Statute 1 *Eliz.* forfeits 400 Marks to the Queen; and if not paid *ut supra*, Imprisonment for a Year.

Third Offence. Forfeits all his Goods and Chattels, and must be committed during Life.

Any Person convicted at the Assizes, or Sessions, to have wittingly *beard*, or to have been present at any other Form of *Common-Prayer*, than what is express'd in the Statute 5 & 6 *Ed. 6. cap. 1.*

First Offence. Imprisonment for Six Months without Bail.

Second Offence. Imprisonment for a Twelvemonth.

Third Offence. Imprisonment for Life.

Justices of *Oyer* and *Terminer* of *Affize*, and Mayors, and Head Officers of Corporations, have Power to hear and determine Offences against the Statute 2 & 3 *Ed. 6.* the Prosecution

must be at the next Assizes after the Offence committed ; but per Statute 23 *Eliz. cap. 1.* the Justices in Sessions have the like Power ; but the Prosecution must be within a Year and a Day after the Offence.

No Form of Prayer shall be us'd in any publick Place, other than according to the said Book ; and every (k) Incumbent, on a Benefice with Cure, tho' he keeps a Curate, is bound once in a Month to read the Service, not having a lawful Impediment ; to be allow'd by the Bishop ; if he neglects, he forfeits for every Offence 5 l. to the Use of the Poor ; the Conviction must be before Two Justices, by his own Confession, or Oath of Two Witnesses.

If the 5 l. is not paid within Ten Days after the Conviction, then the *Churchwardens*, or *Overseers* of the Poor, may, by a Warrant from Two Justices of the Peace, levy it by Distress and Sale of the Offender's Goods.

Besides, upon his Induction, he must, within Two Months afterwards, read the said Service of the Church, appointed for that Day, and likewise declare his unfeigned Assent and Consent to all the Matters and Things therein contain'd.

And that every Parish may be provided with this Book, 'tis enjoind by the (l) Canon, that the *Churchwardens*, or *Questmen* of every Church or Chappel, shall, at the Charge of the Parish, provide the Book of *Common-Prayer*.

Communion-Table.

IT may not be improper to mention some Things concerning the Change of Altars for *Communion-Tables*.

Under the Law, Altars were built for the Sacrifices, and it seems reasonable, that, when the Use of the Thing ceas'd, the Thing it self should cease ; that is, when Sacrifices were abolished, that there should be no farther Use of Altars, especially since our Saviour instituted the Sacrament, not at an Altar, but at a Table.

'Tis true, the Christians call'd the Table an *Altar*, because they believ'd the *Eucharist* to be a Sacrifice in a double respect ; that is, as it was a Sacrifice of Praise ; and likewise of commemorating that voluntary Offering which Christ made of himself on the *Cross* ; but it was still a Table made of Wood, and in the Form of Tables now in use among us ; because we find, that ; when People fled to the Sanctuary of the Church, they hid themselves under those Tables, for the better securing their Persons.

Afterwards, when there was a general Belief of an expiatory Sacrifice in the *Mafs*, the Tables were built a little more

(k) 13 & 14 Car. 2, cap. 4. (l) Can. 80.

resembling the Forms of *Altars*, and then they were properly call'd by that Name.

But *Anno 4. Ed. 6.* it was thought, that the Form of a Table being more agreeable to the Primitive Use of the Sacrament, it might be some Means to reduce the People from the Superstition of the *Mass*; and therefore, to prevent those Heats and Disorders, which had happen'd since the Beginning of the Reformation, concerning the Form, whether of an *Altar* or *Table*, the Government thought it expedient that it should be in the Form of a *Table*.

This was begun by Doctor *Ridley*, then Bishop of *London*, who, in his Visitation in that Year, amongst many other Injunctions, gave this for one, *viz.* Whereas in several Places some use the Lord's Board after the Form of a *Table*, and some of an *Altar*, whereby Divisions may arise amongst the Unlearned; and for that, the Form of a *Table* may turn the Simple from the old Superstitious Opinions of the *Popish Mass*, and to the right Use of the *Lord's Supper*; therefore he exhorteth the Curates and Churchwardens to erect and set up the Lord's Board after the Form of an honest *Table*, decently cover'd in such Place of the *Choir* or *Chancel*, as shall be thought most meet; and to take down all other By-Altars, as he call'd them.

What was done by this good Bishop was afterwards approv'd by the King in Council, and put in practice all over *England*.

And since that Time 'tis appointed by the Ecclesiastical † Canons, *That a convenient and decent Table be provided, kept and repair'd in every Church, and cover'd with Silk or other decent Stuff, thought meet for that Purpose by the Ordinary; and that when the Sacrament is administer'd it be cover'd with a fair Linnen Cloth, and at that Time to be plac'd either in the Church or Chancel, that the Minister may be the more easily heard by the Communicants, and where they may more conveniently communicate.*

Great Disputes have been made in the Beginning of the Reign of *Car. 1.* about the placing this Table.

The || Canon leaves it indifferent, whether to be plac'd in the Body of the Church or Chancel, but enjoins, that it may be order'd so as the Minister may be more conveniently heard by the Communicants, and they more conveniently, and in more Number, may communicate with the Minister.

And because the Body of the Church seem'd the most convenient Place for the Purposes abovemention'd, therefore it was usually plac'd there, except in the King's Chappel, and in Cathedrals, and there it was plac'd at the *East End*, and in the Chancel.

The Table thus plac'd in the Body of the Church was apply'd to many other Uses whilst it stood there, besides setting the consecrated Elements upon it: As for instance, their Church-

† Can. 82. || Can. 82.

wardens pass'd their Accompts on it, Boys were taught to write on it, Glaziers knock'd Nails in it, and Dogs piss'd at it; therefore it was remov'd from thence and fix'd at the upper End of the Chancel, and enclos'd with Rails; and not only so, but the Communicants were enjoin'd to come up to those Rails, in order to receive the Sacrament.

This begat Murmurings amongst the People, which did not end in Law-Suits, there being several commenc'd upon this Occasion; but it created a Paper War amongst the learned Men of that Time, concerning the Manner, Gesture, and Posture of Celebrating the Sacrament; and new Terms and Words were fram'd, such as *Altar*, *Adoration*, and *Genuflexion*; and Books written for and against this Alteration with the same Earnestness for Victory, as if Christianity it self had been at stake.

Archbishop *Laud* was passionately for removing the Table to the Chancel, and Dr. *Williams*, Bishop of *Lincoln*, was as much against it, who wrote a learn'd Book upon this Controversy, in which he call'd this Removal an Innovation in the Exercise of Religion; and withal insinuated, that it would introduce more and greater Alterations in the Church.

This Book was answer'd by Men of Learning, but of no great Name or Reverence amongst the People.

The || Noble Historian tells us this unhappy Controversy, tho' not of that Importance, as for Men of Learning to enter the Lists with so much Passion and Resolution; yet it made a Schism amongst the Bishops, and a great deal of Uncharitableness, even amongst the wise and moderate Clergy, which encreas'd both the Number and Power of the Enemies of the Church.

And nothing would satisfy them till an Order was obtain'd from the Parliament, entitl'd an Order against divers Popish Innovations, dated Sept. 8. 1641. reciting, That whereas divers Innovations, in or about the Worship of God, had been lately practis'd in this Kingdom, by enjoining some Things, and prohibiting others without warrant of Law, to the great Grievance and Discontent of his Majesties Subjects; for the suppressing such Innovations, and for Preservation of the publick Peace, it is this Day order'd by the Commons in Parliament assemb'd, that the Churchwardens of every Parish and Chappel respectively do forthwith remove the Communion-Table from the East-End of the Church, Chappel or Chancel, into some other convenient Place, and that they take away the Rails, and levy the Chancels as heretofore they were.

It doth not appear to me how far this Order was obey'd, for the Civil Wars began soon after, and Matters of greater Concern were then under Agitation:

However, it having been made a constant Article in the Visitations throughout *England*, to present such who had not re-

mov'd the Tables to the East-End of the Chancels; and severe Censures being pass'd upon some Churchwardens, and others in the high-Commission-Court, who had refus'd or neglected so to do; as Fines, Imprisonment, &c. This struck such a Terror into the rest, that generally all the Tables were remov'd to the Chancels; where they still continue.

Commutati^on for Penⁿance.

WHEN Christians were persecuted by Heathens, some of them became *Apostates*; but still they continu'd to associate themselves with those from whom they had laps'd, which gave a general Scandal to the rest, who were of stricter Lives; and purer Morals; therefore it was thought necessary, that for publick Sins there should be open and publick Confessions; and *Penⁿance* was likewise enjoin'd by the Canons which being perform'd; the Penitent was re-admitted to the Church.

It was the chief Business of those Councils which were assembled in the 4th and 5th Centuries, to consult about the Regulation of these Penitentiary Canons; for they were so many, and so difficult to be understood, that few could attain the Knowledge of them; and therefore, in several Churches, there were peculiar Persons, call'd *Penitentiary Priests*, whose Business was only to attend these Services; and by this Means they, and only they, were very expert in the Rules and Methods of *Penⁿance*.

But there was always a favourable Distinction made by these Priests, between those who *voluntarily* confess'd their Sins, and those who were brought in by the Censures of the Church; and this made several come to Confession freely, which was still made in a publick Manner.

And because some of the Offences confess'd were *Capital*, therefore about the End of the Fifth Century it was thought more expedient to have secret Confessions made in Monasteries, or in any other private Place, which the Penitentiary Priest should appoint; who was always a *Fryar*, for the Secular Clergy had no manner of Experience in these Affairs; and those *Fryars* had so manag'd the Business, that the People were made to believe there could be no Absolution in some particular Cases, without a Dispensation from the Pope, which they had always ready, and for which they were paid.

But there was an unlucky Accident at (n) *Constantinople*, which defeated all secret Confession there; for it seems, tho' the Confession was in private, yet the Penitent was bound to publish such of his secret Sins as the *Fryar* should appoint; and there being a Woman at that Time under a Course of *Penⁿance*, whether by Mistake of the Priest, or her own, it doth not ap-

(n) Socrat. Hist. Lib. 5. cap. 19.

Commutation for Pennance.

pear; but she publicly confess'd that she had committed Adultery with a Deacon of that Church, which gave so great a Scandal, that the Bishop broke the Custom there; however, we know it was retain'd long after, and even to this Day, in other Places.

About the End of the Eighth Century, *Commutation* for *Penance* was introduced; and this was either for Services to be done to the Church, or for Money to be paid to the Priest.

The *Services* for which *Penance* was commuted, were either Vocal Prayers, or so many *Pater Nosters* to be said, within a limited Time, or so many Masses; but when the Pope had depos'd any Prince, then all the Methods and Rules of *Penance* were dispens'd withal, to such who should fight under the Cross, against that Prince.

But in a little Time all those Things were laid aside for Money, which was never refus'd at first from the Rich; for it was then, and is still, accounted the best *Commutation* that can be had for *Penance*.

This we find in Doctor *Barker's* Case, which is imperfectly reported by (o) *Serjeant Rolls*, in Scraps of *English* and *French*; but probably it was, because his Pocket was pick'd of his *Noses* (as he tells us) coming from the *Star-Chamber*; but it was thus.

The Doctor was *Official* in the Diocess of *Oxon*, and the Register of his Court libell'd against him in the *Star-Chamber*, for taking *Commutation* before any *Penance* was actually enjoin'd in the Presence of that Register, and made an Act of Court; and for that the Money was taken in his Chamber, which he kept, and did not apply to charitable Uses as he ought.

The Proof was, that when an Offender was before the Doctor in private, he ask'd him, whether he knew a Thing call'd *Commutation*? The Person reply'd, he did not; then the Doctor inform'd him it was, that one good Turn requir'd another: This being easily apprehended, he offer'd the Doctor 10*l.* which he refus'd to receive in Person; so the Money was given to his Servant, who left it on the Doctor's Table.

My Lord *Hobert*, and the rest of the Judges would not censure the Doctor, because this was no positive Proof of his taking the Money, tho' it was walking very near the Brink of falling, and receiving Money not with a full, but trembling Hand.

But the chief Justice thought it convenient, both for the Church, and for the whole Nation, that some Order should be made in how long Time the Money might be kept before it was employ'd in Charity; and one of the Judges was of Opinion that in some Cases the Money might be taken, not only when the Court was not sitting, but out of the Diocess: As for Instance; Those Cases which are *Contentiosa Jurisdictionis*,

must be determin'd in open Court; and in such Case there shall be no *Commutation* without the Consent of the Prosecutor; but in Cases *Voluntarie Jurisdictionis*, as where the Enquiry is *Ex Officio*, there 'tis otherwise:

The Archbishop, at that Time, advis'd with the *Civilians*; and from them, and by his own Experience, tells us, that *Commutation* agreed with the Ecclesiastical Canons; that it was likewise justify'd by the Common-Law: In that I believe he was mistaken; but he was right in affirming that it was justify'd by the Statute *Circumspecte agatis*, by which the Temporal Judges are advis'd to take Care how they punish those who hold Pleas in Spiritual Courts, for Fornication, Adultery, &c. for which sometimes a Corporal, and at other Times a Pecuniary Punishment is inflicted; by which Words, my (p) Lord Coke tells us, *Commutation* is meant, and so it is in the Statute call'd *Articuli Cleri*, by which 'tis provided, that if a Prelate enjoin Corporal Penance, and the Party afterwards commutes for Money, 'tis recover'd in the Spiritual Court, and no Prohibition will lye in such Case.

Composition Real for Tythes:

A *Real Composition* is, where the Incumbent, together with the Patron and Ordinary, by Deed executed under their Hands and Seals, do agree, that such Lands shall be discharg'd of Tythes; which are mention'd in the Deed, paying some Annual Payment, or doing something for the Profit or Advantage of the Parson; and this is a legal Exemption from Payment of Tythes, if made before the Statute 13 *Elix. cap. 10.* by which all Estates made of Tythes, other than for 21 Years, or Three Lives; from the making thereof, &c. are made void; and for such Annual Payment the Remedy is proper at * Common Law.

Some Instances we have of this Nature in our Books, viz. As where an (q) Abbot was seiz'd of a Farm, situate within a Prebend, and he and the Prebendary made a real Composition in the Reign of H. 3. that he and his Successors should be forever discharg'd of Tythes of so much of the said Farm as they us'd themselves, paying to the Prebendary Five Marks *per Annum*.

About 100 Years afterwards, there was another Composition made between an Abbot and a Prebendary of the same Prebend, reciting the former Composition; and that it should be at the Election of the Prebendary, to take the Tythes in kind, arising out of the whole Farm; and not only out of those Lands which the Abbot manur'd himself, or to have the Five Marks.

The Prebend afterwards came to the Crown, and it was held, that the first Composition was good, but the second was

(p) 2 Inst. 489. 2 Inst. 619. * 2 Inst. 490. (q) Hist. 380.

not; because, since the Prebend came to the Crown, there could be no Election made according to that Composition.

The learn'd Bishop of Worcester hath made a Question, whether a *Real Composition* is binding, if made for a Thing within Time of Memory; as for Tythe of Hops, which were not us'd in *England* before the Reign of *H. 8.* but he gives no satisfactory Answer to the Question.

However, I can see no Reason, if such a Composition was made before the Statute 13 *Eli.*, but that it should be binding.

'Tis true, a Man cannot prescribe for a (*r*) *Modus* in such Case, because 'tis the Nature of a Prescription to be immemorial; and the first Use of Hops was within Time of Memory.

As in many other Things, so in relation to Tythes, there is a great Difference between the Clergy and the Laity; for a Layman was not capable at Common Law either to have Tythes, or to sue for them before the Statute 32 *H. 8.* as it was resolv'd in the * Bishop of Winton's Case; yet he was capable to take a Discharge of the Payment of Tythes out of his own Lands, which was by a real Composition, that being the only Means by which he could be discharg'd of the Payment *In Specie*; and therefore he might prescribe *In modo Decimandi*, because that is grounded upon a real Composition, which, tho' lost, shall be suppos'd to be once made, and shall be supported by Time and Usage.

But a Layman cannot prescribe in his own Name to be discharg'd of Payment of Tythes, as a Spiritual Person may do; because, as it hath been observ'd, he was not capable at Common Law to have Tythes; he may lay such a Prescription in a Spiritual Person, and derive a Title from him; but that shall never be intended to commence upon a real Composition, in order to make the Land be discharg'd of Tythes, because a Spiritual Person or Corporation have more Privileges in this respect than a Layman; for they might be discharg'd from Payment of Tythes, either by a particular Order, or by the Pope's Grant; and this being a Personal Privilege, 'tis lost when the Corporation is dissolv'd; and the Lands shall pay Tythes, unless exempted by the Statute 31 *H. 8.* which see in Title *Monks*.

So where the † Abbot of *Abingdon* held Lands discharg'd of Tythes, and convey'd the said Lands to *All-Souls* College in *Oxon.* the College shall pay Tythes, because it shall be taken, that the Abbot was discharg'd by Prescription, and not by Composition; which Prescription being Personal (as are also all Discharges by particular Orders) is determin'd by the Alienation.

(*r*) Sid. 443. * 2 Rep. 43. Jones 363. 2 Cro. 58. Moor 913. Cro. Car. 422. Yelv. 2. † Sid. 321.

But it was from these Compositions that most Prescriptions * *De modo decimandi* did at first arise; tho' 'tis probable, that some of them began, and were continu'd by the Negligence of the Clergy themselves.

The Canonists have made some Limitations in this Case; but first they lay it down for a Rule, that Custom shall not prevail for the Payment of less than a Tenth Part; but then they say, this must not be understood where it relates to the Payment of Personal Tythes, which arose purely by the Labour or Art of Men; for in such Case the Clergy may acquiesce with a good Conscience, under a Custom, to pay less than the real Value of the Tenth Part of the clear Gains; for they accept *Easter-Offerings* of the People, which are a kind of Composition for Personal Tythes.

Besides, Personal Tythes are founded upon the same Laws as all other Tythes are; now by the Statute 2 *Ed. 6. cap. 13.* Predial and mixt Tythes are reduc'd to such a *Customary Payment*, as had been us'd Forty Years before the making that Act, where, by the Words *Customary Payment*, something less is intended than the real Value of the Tenth Part; and if such a Payment is establish'd by Law, for those Tythes, it may also be good for Personal Tythes.

'Tis true, the Canonists would not seemingly allow less than the Tenth Part in any Tythes; but to extenuate the Matter, they did, by Provincial Constitutions, set a less Value upon Things, out of which the Tythes was to arise, than they were really worth; as for Instance, *Anno 7 H. 7.* there was but a Half-Penny paid for a Lamb of a Year old, that being accounted the Tenth of the Value of a Lamb of that Age, which Payment was allow'd to be good.

The Bishop of *Worcester* seems to incline, that this must be grounded upon some *Real Composition*, because a Lamb of a Year old was worth more than Five Pence in those Days; but it may as well be grounded upon setting a less Value upon the Thing itself, tho' I confess this is no very good Instance of it; for 'tis probable a Lamb of a Year old was not worth more than Five Pence at that Time; because I find that *Anno 25 H. 8.* which was long afterwards, the Price of a fat Lamb was but a Shilling.

These *Real Compositions* are distinguish'd from *Personal Contracts*; for tho' the one have been always allow'd to be a good Discharge for the full Tythes, yet the other are not.

Now that *Composition*, which is call'd a *Personal Contract*, is only an Agreement between the Parson and the Parishioners, to pay so much in Lieu of Tythes; and tho' such an *Agreement* is confirm'd by the *Ordinary*; yet that doth not make it a (*f*) *Real Composition*, because he ought to be a Party to the

* Jones 369. (*f*) March 87.

Deed; and his confirming it afterwards, doth not make him so, neither doth it alter the Nature of the Agreement.

Such a *Personal Agreement* was held good, (1) *Anno 4 Jac. 1.* if it was for Years, tho' only verbal: But in the same King's Reign, about Nine Years afterwards (u) it was held otherwise; that such a Verbal Agreement is neither good, or binding to the Parson, or his Successors, if intended to pass a (x) Right; but 'tis good to bar the Parson from an Action of Debt, upon the Statute 2 Ed. 6. for not setting out the Tythes.

But now, since the Statute 13 Eliz. cap. 10. 'tis held, that no *Real Composition* can be good to bind the Successor; because, by the Statute, the Grants of Ecclesiastical Persons are restrain'd to 21 Years, or Three Lives.

But the later Authorities are, that a * *Personal Agreement* shall bind the Successor: As for Instance; There was an Agreement by a former Incumbent of the Rectory of *South-Collingham* in *Nottinghamshire*, and the Proprietors and Terre-tenants of Lands in that Parish, in the Behalf of himself and his Successors, *Anno 1650.* that the Lands in that Parish should be enclos'd at the Charge of the Owners, and that the said Rector and his Successors should have the 10th Acre for his and their sole Use, in full Discharge of all Tythes, &c. That in Pursuance of that Agreement the Lands were enclos'd, and that the Tenth Acre was likewise enclos'd and set apart for the Rector, which he accepted in Discharge of the Tythes; that he continu'd Rector of that Church for 18 Years; that his Successor consented to the said Agreement, and enter'd upon the Tenth Acre, and enjoy'd the same several Years after he was Rector, during all which Time the Owners were discharg'd of Tythes; but that afterwards he libell'd for Tythes in *Specie*; and the Plaintiff in a Prohibition suggests, that he had pleaded all this Matter in the Spiritual Court; and the Defendant travers'd the Agreement; and issue being taken upon that Traverse, the Plaintiff had Judgment by the Opinion of all the Judges of the Common-Pleas, *Anno 1. Anna Regina.*

Confirmation of Leases; See in Title Leases.

Confirmation of Bishops.

THIS is done by a long and formal Process, of which I shall give the Reader a short Account.

After the Dean and Chapter elected the Parson recommended to them by the Queen, to be the succeeding Bishop to a vacant See; and this Election is certify'd to the Queen, and to

(1) Yelv. 94. (u) Hob. 176. (x) Raym. 14. * 2 Lutw. 1057.

the Archbishop of that Province; She grants Her Royal Assent under Her Great Seal, which is exhibited to the Archbishop, requiring him to *confirm* the Election, upon which he subscribes *Fiat Confirmatio*.

The Archbishop thereupon issues forth a Commission under his Episcopal Seal, directed to the Vicar General, to perform every Thing requisite to such Confirmation.

The Vicar-General issues forth a general Citation for all those to appear, who have any Thing to offer against this Election; which Citation being return'd, the Proctor for the Dean and Chapter exhibits the Queen's Assent to the Election, and Her Commission to the Archbishop to confirm it, which the Vicar-General reading, accepts it.

Then the Proctor exhibits the Proxy for the Dean and Chapter, and presents the elected Bishop to the Vicar-General, returns the Citation, and desires that the Opposers may be thrice publicly call'd; which being done, and none appearing he desires the Vicar-General to proceed, which is order'd accordingly.

Then the Proctor exhibits a Summary Petition, containing the whole Proceedings, and Desires that a Time may be appointed for him to prove it, which the Vicar-General decrees.

Then he again exhibits the Assent of the Queen and of the Bishop, and the Certificate of the Election to the Archbishop, desiring a Time for a Final Election, which is likewise decreed.

Then the Proctor once more desires, that all Opposers may be call'd; which done, and none appearing, they are pronounced *Contumaces*, and a Decree is then made to proceed to Sentence.

Then the Bishop having taken the Oaths against Simony, of Supremacy, and of Canonical Obedience; the Sentence is read and subscrib'd by the Vicar-General, by which the Election is confirm'd, and decreed to be good.

And till this *Act of Confirmation* is perform'd, the Bishop's Elect may be rejected, because there may be some Reasons given, why he should not be made a Bishop; and for that Purpose those Citations above-mention'd are made for any Man to come in, who hath just Reason to oppose it.

After (y) *Confirmation* the Power of the Guardians of the Spiritualities ceaseth; and if a Writ is directed *Episcopo electo & confirmato*, 'tis good; and the Queen may, *Ex Gratia*, after such Confirmation, and before Consecration, grant the Temporalities to the Bishop thus elected and confirm'd.

But if the Bishop of one Diocese is translated to another, there is no Occasion of a new *Confirmation*.

Justice *Doderidge*, in his *Argument of Evans and Ascue's* (1) Case, tells us, there is a Spiritual Marriage between the Bishop and his Church, which is begun by Election, contracted by Confirmation, and consummated by Consecration; and that the Restitution of the Temporalities is like conducting the Man to the Woman, so that he is not a compleat Bishop by Confirmation; he hath only *Potestatem Jurisdictionis*, for he may certify an Excommunication, he may give Institution; and this appears by the Year-Book, 22 Ed. 3. *Plito* 25. where the Case was thus:

The Plaintiff had recover'd, in a Writ of Right of Advowson, and had a Writ directed to the Bishop of *Norwich*, *Electo & Confirmato*, to admit his Clerk; the Bishop refus'd, and thereupon another Writ of *Quare non Admissi* issu'd against him, reciting the Recovery, and the former Writ directed *Epo' Electo & Confirmato*; and this was held to be good by one of the Judges, who was angry with his Brethren for being of a contrary Opinion, *viz.* That it ought to be *Tunc Electo & Confirmato*; which shews, that if the Writ had been right, a Bishop elected and confirm'd, might have granted Institution.

Consecration of Bishops.

AFTER Confirmation, the next Thing to be done is *Consecration*; and this is done by separating the Person to the Holy Office of a Bishop, by Imposition of Hands and Prayer; 'tis usually perform'd by the Archbishop: But when an Archbishop is to be consecrated, it must be done by an Archbishop, and Two other Bishops, according to the Fourth Canon in the first *Nicene Council*, or else by Four Bishops; and this is required by the Statute 25 H. 8. cap. 20. which is agreeable to that Answer Pope *Gregory* gave to *St. Austin*, asking him, whether a Bishop might be ordain'd without the Presence of other Bishops, if by Reason of any great Distance they could not be present? Who positively affirm'd, it could not be done; but that at the Ordination of a Bishop there ought to be Three or Four other Bishops assisting.

After Consecration, the Bishop is complete, as well in relation to Spiritualities as Temporalities; and by the Civil Law this was held essential to the Office and Dignity of a Bishop; 'tis an indelible Character, of which he can never afterwards be depriv'd, tho' the Execution of Spiritual Jurisdiction, and all the Profits of his Bishoprick should be taken away: He hath *Potestatem Ordinis*, for he may confer Orders, and consecrate Churches, and hath such an absolute Right to the Temporalities, that, that tho' they be granted to him, *Ex Gratia*, immediately upon Confirmation, yet he cannot sue for them till after Consecration.

But when a Bishop is translated, there is no occasion of a new Consecration.

As to the particular manner of Consecration, 'tis prescribed in the Book of *Common-Prayer*, which is establish'd by Law; tho' Bishop *Bonner* objected against Archbishop *Parker's* Consecration, that the very Office of Consecration had no legal Authority; for he insisted, that the *Common-Prayer-Book* was established by an Act of Parliament, Anno 5 & 6 Ed. 6. which Act was repealed by Queen *Mary*, and that Book expressly condemned.

'Tis true, Queen *Elizabeth* enacted again King *Edward's* *Common-Prayer-Book*, and repealed that Law made by her Sister; but the Office of Consecration was not expressly named in this last Act of Repeal, and therefore it could not be revived unless it had been particularly named; and if so, the Objection is, that a Consecration performed by that Book is not according to Law.

But this will receive a plain Answer, for the Office of Consecration was made part of the *Common-Prayer-Book*, by the Statute 5 Ed. 6. and when that was re-enacted after a Repeal, there was no occasion to mention it distinctly, because it was part of the *Common-Prayer-Book* before; however, it was declared by a subsequent Parliament, that the Office of Ordination was confirmed as part of the *Common-Prayer-Book*, and then they declared it to be good; which is likewise declared so to be by the 36th Article of our Religion.

And here I cannot but take Notice of the Consecration of Archbishop *Parker*, which the Adversaries of the Church of *England* affirm to be irregular, both as to the Place where it was done, which they say was at the *Nag's Head Tavern* in *Cheapside*, when it ought to have been at some Church or Chappel; and likewise as to the Manner of doing it, which they say was by one of the Bishops then present, who laid the Bible on his Head, and then pronounced these words, *Take thou Authority*, &c. when it ought to be done by Imposition of Hands and Prayer, accompanied with other words, viz. *Receive the Holy Ghost*.

'Tis farther objected, that Three of the Four Bishops then present were only Bishops Elect, and had no Sees; and that the other was a Suffragan: So that if Archbishop *Parker's* Consecration was not good, all those who were consecrated by him were not Bishops, because he could not confer that Character upon others, which he had not himself.

The Story hath long since been confuted by Bishop *Bramhall*, but 'tis set in a clearer Light by the learned Bishop of *Sarum*, which was thus:

The Queen issued forth her Warrant, directed to the Bishop of *Landaffe*; to Doctor *Scory*, Elect of *Hereford*; Doctor *Barlow*, Elect of *Chichester*; Doctor *Coverdale*, Elect of *Excester*; and Doctor *Hodgskins*, Suffragan of *Bedford*. All

All these Persons met at the *Nag's Head Tavern*, where it had been usual for the Dean of the Arches, and the Civilians, to refresh themselves after any *Confirmation* of a Bishop; and there one *Neale*, who was *Bonner's Chaplain*, peeped through a Hole in the Door, and saw all the other Bishops very importunate with *Landasse*, who had been dissuaded by *Bonner* to assist in this *Consecration*, which he obstinately refusing, Doctor *Scory* bid the rest kneel, and he laid the *Bible* on each of their Shoulders or Heads, and pronounced these words, *Take thou Authority*, &c. and so they stood up all Bishops, of which I suppose Doctor *Parker* must be one, tho' my Lord of *Sarum* doth not mention it.

This Story was certainly invented after the Queen's Reign; for if it had been true, 'tis so remarkable, that some of the Writers of that Time would have taken Notice of it.

But my Lord of *Sarum* hath discovered the Falsity of it, from an original Manuscript of the *Consecration* of this very Archbishop, which was done in the Cappel at *Lambeth*, on Sunday the 17th of *December*, in the First Year of that Queen's Reign, where Doctor *Parker* came a little after Five in the Morning, in a Scarlet-Gown and Hood, attended by the said Four Bishops, and lighted by Four Torches; and there, after Prayers, Doctor *Scory* preached; then the other Bishops presented the Archbishop to him, and the Mandate for his *Consecration* being read by a Doctor of the Civil Law, and he having taken the Oaths of Supremacy, and some Prayers being said, according to the Form of *Consecration* then lately published, all the Four Bishops laid their Hands on the Archbishop's Head, and said, *Receive the Holy Ghost*, &c. And this was done in the Presence of several other Doctors.

After this *Consecration* the Archbishop, amongst others, consecrated Doctor *Jewell*, Bishop of *Salisbury*, who by reason of this Story, was never allowed to be a Bishop by his Adversary *Harding*.

Consistory Court.

AFTER the Empire became Christian, and Princes had given Bishops Jurisdiction in particular Cases, it seemed necessary that they should have proper Courts where such Causes should be determined; for it was probable, that an Ecclesiastical Judge might give them a quicker Dispatch, and in a more regular manner than one of another Profession.

Besides, there might be a Politick Reason for it, viz. that such Disputes and Differences, which did arise amongst the Clergy, might be kept amongst themselves, and not divulged amongst Laymen, to the Discredit of the whole Order.

Some of the Reform'd Churches abroad, and in particular those of the *Netherlands*, pretend that their Ecclesiastical Government comes nearer to the Form of the Christian Church, which

which was first planted by the Apostles, than the Government of any other Church whatsoever; for their Consistory is composed of certain Ministers and Elders of a particular Church; then they have a *Classis*, or an Assembly of Deputies from several Consistories, and the Deputies of all the *Classes* of a Province compose a Provincial Synod, which is held every Year; and the Deputies of several Provincial Synods make a National Synod, which meet but seldom, and then only to decide Affairs of the greatest Importance concerning the whole Church,

But with us here in *England*, the Ecclesiastical Jurisdiction in the *Saxon* Reigns was not separated from the Civil; for the *Earl* and the *Bishop* sat in one Court, that is, in the County-Court; and all Causes were determined either there, or in the Sheriff's Turn, as well those which concerned God's Right as the World's (which was the Phrase of those Times.)

'Tis uncertain, how long this mix'd Jurisdiction continued after the Conquest, some are of Opinion not very long; because King *William*, in a Charter which he granted to the Dean and Chapter of *St. Mary* in *Lincoln*, commanded that no Bishop *de legibus Episcopalis amplius in hundredo placita teneat*, and that he settled the *Consistory-Court*, and ordered such Causes to be tried there.

But this Charter may very well be suspected to be true; for my Lord *Coke* himself tells us, That no Account can be given of it, till 2 R. 2. and that he found it was not enrolled at that Time in the Registry of the Bishop of *London*.

Besides, 'tis very certain that this mix'd Jurisdiction continued many Years afterwards; for in the *Red Book of the Exchequer*, amongst the Laws of *H. 1.* in the Chapter *de generalibus placitis comitatum*, we have an Account, that the Bishops and Earls did there meet, and heard Ecclesiastical Causes.

'Tis probable this Jurisdiction came to be divided sometime in the Reign of *H. 2.* when Archbishop *Becket* made a Distinction between the Ecclesiastical and Civil State, and plainly told that *King*, that he had no Power to determine the Affairs of the Clergy in his Temporal Courts.

Then, and not before, were these Ecclesiastical Courts erected, which were called *Consistories*, where the Bishop himself, at first, sat in Person to decide all Causes proper for his Jurisdiction.

But afterwards, when Bishops became *Barons* by *Tenure*, and by reason thereof were obliged to attend the Superior Courts; and when Causes were multiplied in the Consistories, then it was necessary to delegate this Power to other Persons, who *de jure Speciali* might hear and determine those Causes; and this was first committed to *Chancellors*, who sat in the Consistory-Courts, and afterwards to *Commissaries*, who sat in Places more remote from those Courts,

But

But what was done there is in the Right of the Bishop himself, because from the Sentences of those Judges there lies no Appeal to him, but to the Archbishop of the Province in his Court of *Arches*, which is his Consistory.

Conventicle, } See { Preaching,
Register.

Convocation.

THIS is an Assembly of all the Clergy of England, either in Person, or by their Representatives, to consult of Ecclesiastical Affairs, and 'tis usually in Time of Parliament.

It consists of Two Houses, probably in Resemblance to our Two Houses of Parliament: In the Upper-House there are 22 Bishops, of which the Archbishop is President; and these personally sit in the House of Peers: The Inferior Clergy make the Lower-House of Convocation, and they are represented by the Proctors which they elect, and do sit by themselves; and these consist of all the Deans and Archdeacons, of One Proctor for every Chapter, and Two for the Clergy of every Diocese, in all 165 Divines, viz. 22 Deans, 53 Archdeacons, 24 Prebendaries, and 44 Proctors of the Diocesan Clergy; they choose their Prolocutor, and Present him to the Archbishops and Bishops of the Upper-House, intimating to them, that they intend to deliver their Resolutions by him to that House; this is part of his Office: And likewise he is to take care that the Members attend; and he is also to collect their Debates and Votes; and that this may be done without Interruption, both they and their Servants have the same Privileges of Protection, as the Lay-Members of Parliament have during the Time of their Session.

This Lower-House of Convocation were formerly called together by Two distinct Writs, of which I shall give as clear and distinct an Account as I can.

The first was the King's Writ to the Bishops of every Diocese, summoning them to appear themselves in Parliament, with this Clause in it, viz. *Pramuniemus priorem & capitulum Ecclesie Vestre Archidiaconum totumq; Clerum Vestrae Diocesis, facientes quod iidem Prior & Archidiaconus in propriis Personis suis dictumq; capitulum per unum idemq; Clerum per duos procuratores idoneos plenam & sufficientem potestatem, ab ipsis capitulo & clero habentes: Una nobiscum intersint, modis omnibus tunc ibidem ad tractand. ordinand. & faciend. nobiscum & cum ceteris prelatiis proceribus; & aliis incolis regni nostri qualiter huiusmodi periculum & excogitatis malis obviandum: Teste Rege apud Wengeham 30 die Septembris, &c.*

This

This is called the Parliamentary Writ, and the Proceedings on it were as follow, *viz.* Upon the Receipt of it, the Bishop sent his Mandate to the Dean and Prior of his Cathedral, and likewise to the Archdeacon reciting this Writ to him, &c. And by this Mandate he commanded the said Dean and Prior to appear in Person, and to warn the Chapter to send one of their Body, and the Clergy of his Diocess to send Two Proctors to represent them in Parliament.

After the Receipt of this Mandate, the Dean, Prior and Archdeacon, certified the Bishop what they had done in Obedience to it; in which Certificate the Bishop's Mandate was recited, the Chapter also met and deputed their Proxy by an Instrument under their Common Seal, &c. which was always exhibited on the First Day the Parliament sate.

Some have been of Opinion, that the Clergy, at that Time, sate in Parliament, by Virtue of this Premonitory Clause in the Bishop's Writ, and were a constituent Part of it, and so continued till the Reign of *H. 8.* in whose Reign they fell under a *Premunire*, by submitting to Cardinal *Wolsey's* Legatine Power; and that tho' the King pardoned the Fault, he would not restore them to their former Place.

'Tis certain, that the *Convocation*, (*a*) *Anno 1 Ed. 6.* apprehended, that they had a Right to sit in Parliament; and therefore they petitioned the Archbishop and Bishops in the Upper-House of *Convocation*, that they would intercede with that King, and the Protector, to be restored to the same.

This was attempted again by the Clergy, in the latter end of the Queen's Reign, and a Paper was offered to Her, containing several Reasons to induce Her to grant their Petition, which were to this effect;

Because the Clergy had formerly been thought very proper Persons to consult with the Laity about Civil Affairs, as well as altogether about Ecclesiastical Matters, which were seldom debated in Parliament.

That there would be no danger they should attempt any thing there concerning Religion, or against Her Prerogative, because they were restrained by an Act in Her Father's Reign, to make any Attempt in Matters of that Nature without Her License.

That it did not appear why they were excluded the House, but that it was probable it might be because they were all guilty of a *Premunire*, &c.

That they are still summoned by several Writs to the Bishops, to assist the King in Parliament.

That both the Universities, and the Clergy, were in a worse Condition than the Laity, who had their Representatives there; that it was not consistent with the Wisdom of the Law, that any Subject should be bound by an Act of Parliament to which

(a) B. H. R. 2 Pl. 47.

he was not virtually consenting; and that such Acts were then made without the Privy or Consent of the Clergy, who, being excluded the House, could not answer any Motions made there to their Prejudice.

That restoring them to the Parliament would advance the Reputation of the Clergy, by whose Dignity the Civil State was supported; and that it would be for the Honour of the Queen and Her Memory, to leave some of the Clergy in that House to stand up for that Government; which She had establish'd in opposition to any Innovations of Popery or Puritanism.

And lastly, That it would recover the ancient Authority of that House, to have Men of Religion and Learning restored to them, instead of Minors and Out-laws, who were injuriously crept into that honourable Assembly; that the Rashness and Inadvertency of such Men might be counterpoised by sober and discreet Persons, especially considering that a Cypher may promote an Unit to Ten.

But these Reasons did not prevail with that Queen, therefore it was endeavour'd again in the next Reign, but still without Success; and because it hath been lately attempted, and still by Virtue of this Premonitory Clause, I shall endeavour to give a true Account of it.

But first I shall mention, that every Bishop is summoned to Parliament, in respect of their *Baronies*, which they held of the Queen, for which and for their Temporal Lands, they were always taxed by themselves, and never by the Laity till lately, viz. Anno 16 Car. 2.

Now the first Writ of Summons of a Bishop to Parliament extant on Record is Anno 49 H. 3. in these words;

Henricus dei gratia Rex Angliæ Dominus Hiberniæ & Dux Aquitania venerabili in Christo patri R. eadem gratiâ Epô Dunelm Salutem Cum post graviaurbationum discrimina dudum habita in regno charissimus filius Edrus primogenitus noster pro pace in regno nostro assensuranda & firmanda obses traditus extrinset & jam feduta (benedictus Deus)urbatione prædicta, Super deliberatione ejusdem salubriter providenda & plena securitate & tranquillitate pacis ad honorem dei & utilitatem totius regni nostri firmanda & totaliter complenda & Super quibusdam aliis regni nostri negotiis quæ sine consilio vestro & aliorum prælatorum & magnatum nostrorum nolumus expediri cum iisdem tractatum habere nos oportet vobis mandamus rogantes in fide & dilectione quibus nobis remini quod omni occasione postposita & negotiis aliis prætermisissis sitis ad nos London in octabis Sancti Hilarii prox futur nobiscum & cum prædictis prælatis & magnatibus nostris quos ibidem vocari fecimus super præmissis tractatur: & concilium impensur: & hoc sicut nos & honorem nostrum & vestrum necnon communem regni nostri tranquillitatem diligentius nullatenus omittatis: Teste meipso 14 Decem. Anno regni nostri 49.

About

About 29 Years afterwards this Clause was first inserted in the (b) Bishop's Writ, viz. *Anno 23 Ed. 1.* it was then a Time of Invasion; for the French King had surprized Gascony by Fraud, and had provided a Navy to invade this Kingdom: This is recited in the Writ it self, and our Historians tell us, that they landed at Dover on the 8th Day of September, and burnt a great part of that Town, and killed an old Monk.

The Clergy were then assembled by this Premonitory Clause, not to consult about any Ecclesiastical Affairs; but as the Clause it self imports, *Ad obviandum hujusmodi periculis & excogitatis malitiis*: And this could not be done, but by repelling the Enemy by Force, and therefore they were summoned to assist the Crown, by granting a Supply out of their own Estates, to carry on the War against France.

They were not called to represent the Church, or to settle its Discipline, but upon a political Reason to assist the Government with Supplies; and therefore the very original of this Clause was accounted an Arbitrary Effort of that King, from which the Clergy petition'd him to be relieved, and afterwards made their Remonstrances against it; for they look'd upon it as a Burthen to attend the Parliament by the *Praemunientes* for no other purpose but to tax themselves.

This being the first occasion of the *Praemunientes*, it was continued in that King's Reign, tho' not constantly; but whenever the Clergy met by Virtue of this Clause, they were a pure Parliamentary Assembly, they were a State-Convention, and not a Church-Synod; and the intent of their Meeting was to consult about their Civil Rights, to have their Grievances redressed, and to consider what Proportion they should contribute out of their Estates towards the Support of the Government, and therefore it was necessary that they should be assembled with the Parliament and end with it.

But the Clergy in the next Reign apprehended that they had no manner of Obligation to obey this Lay-Summons, tho' from a King, and some of them refused to attend the Parliament upon such Summons; therefore Archbishop Winchelsea, having an ascending Power over Ed. 2. who was a weak Prince, attempted to discharge them from it; and so far prevailed, that at the same Time the King sent this Parliamentary Writ to the Bishops, he sent another to the Archbishop to summon all his Provincial Bishops to the Convocation; the Form of which Writ is printed by (c) Mr. Heylin, and by the Bishop of Sarum, and is thus:

Regina, Sc. Reverendissimo in Christo patri & fideli consiliario nostro Tho. Cantuarien' Archiepiscopo totius Angliae primati & metropolitano, Sc. Salutem. Quibusdam arduis & urgentibus negotiis nos defensionem & securitatem Ecclesiae Anglicanae ac pacem tran-

(b) 23 Ed. Membran. 3. Dorso.

(c) Fol. B. H. R. Coll. Rec. lib. 2. 6,

quilitatem

quilitatem & bonum publicum & defensionem regni nostri & subditorum nostrorum ejusdem concernentibus vobis in fide & dilectione quibus nobis tenemini rogando mandamus quatenus præmissis debito intuitu attentis & ponderatis universos & singulos Episcopos vestrae Provinciae, ac Decanos Ecclesiarum Cathedralium, nec non Archidiaconos capitula & collegia totumque Clerum cujuslibet dioceſeos ejusdem Provinciae ad comparandum coram vobis in Ecclesia Cathedrali Sancti Pauli, London, vel alibi prout melius expedire videritis cum omni celeritate accomoda modo debito convocari faciatis ad tractandum consentiendum & concludendum super præmissis, & aliis quæ sibi clarius proponuntur tunc & ibidem ex parte nostra, & hoc sicut nos, & statum regni nostri, & honorem, & utilitatem Ecclesie prædictæ diligitis nullatenus omittatis: Teste meipso, Sc. apud Westm. 13 die Septembris, Anno Regni nostri septimo.

This is called the *Provincial Writ*; and when it first issued forth with the *Parliamentary Writ*; it was only a second Summons of those who were summoned before by the *Premonitory Clause* in the *Bishop's Writ*: It was to secure the Obedience to the *Lay-Summons*, and to make the Assembly more Canonical, as meeting by Virtue of a Summons from their Archbishop.

The Abbots and Priors before the Reformation were summoned to Parliament by a particular Writ directed to them, which they sometimes refused to obey, because it came from a Layman, tho' a King, and they held nothing of him *per Baroniam*.

Therefore this Writ to the Archbishop from the King to summon a Convocation, at the same Time he summoned the Bishops to attend in Parliament, might be a means to bring in those Regulars to appear at that Time, who would willingly obey the Commands of the Archbishop; tho' they refused to comply with the King's Writ.

This Writ is ordered by the Lord Chancellor, prepared by the Clerk of the Crown, and transmitted by him to the Archbishop, who usually has an Agent to attend the Clerk of the Crown, and receive it from him, and give a Discharge for it:

Thereupon the Archbishop makes his Mandate to the Bishop of London, as Dean of his Province, the Form of which is as followeth:

¶ Thomas providentia divina Cantuar Archiepiscopus totius Angliæ primas & metropolitanus venerabili confratri nostro Henry eadem providentia divina London Episcopo Salutem & fraternam in domino charitatem, Breve illustrissimi principis in Christo & Domina nostre Anne dei gratia magna Britannia; &c. fidei defensoris; &c. nobis inscriptum & directum nuper cum ea qua deuit reverentia obedientia & subjectione humiliter recepimus in hæc verba; Anna dei gratia, &c. (as in the Writ) Quo circa fraternitati vestre committimus & mandamus quatenus omnes & singulas Coepiscopos Ecclesie nostre Christi Cantuar constitutos preemtorie citetis & per eos De-

sancis Ecclesiarum Cathedralium & Collegiatarum & singula capitula earundem Archidiaconosque & alios Ecclesiarum Prælatos exemptos & non exemptos Clerumque cuiuslibet Diaces provincia nostra Cantuar antedicta peremptorie citari & pramoneri volumus quod iidem Episcopi Decani & Archidiaconi & ceteri Ecclesiarum Cathedralium prælati exempti & non exempti personaliter & quolibet Capitulum Ecclesiarum Cathedralium & Collegiatarum per unum Clerusque cuiuslibet Diaces provincia nostra supradicta per duos sufficientes Procuratores compareant coram nobis aut nostro in hac parte locum tenente sive Commissario (si nos impediri contigerit) in domo Capitulari Ecclesie Cathedralis divi Pauli London, die Luna, Sc. tertio die Decembris jam prox' futur' post datum presentium cum continuatione & prorogatione dierum extunc proximum sequentium & locorum (si oporteat) fiend' ad tractand' super arduis & urgentibus negotiis statum & utilitatem, bonum publicum, & defensionem regni Anglia & Subditorum ejusdem concernen' ipsis tunc & ibidem seriose exponendis suaque sancta consilia & Auxilia super eisdem impensur de aliis qua ibidem ex deliberatione communi ad honorem Dei & Ecclesie utilitatem salubriter ordinari & statui contigerit consensur ulteriusque factur & receptur quod justum fuerit & huiusmodi negotii natura & qualitas de se exigunt & requirunt, vos autem venerabilis confrater dictum mandatum quatenus vos & capitulum Ecclesie vestra Cathedralis ac Civitatem & Diaces London concernit exequi per omnia faciatis & eidem pareatis in omnibus cum effectu, præterea tenore presentium vos citamus quatenus eisdem die & loco coram nobis aut nostro in hac parte locum tenente sive Commissario uno vel pluribus una cum aliis venerabilibus confratribus nostris dictæ provincie nostre Cantuar Coepis compareatis super huiusmodi negotiis ut præmittitur tractaturū nec non factur & receptur quod justum fuerit & quod ad vestram paternitatem attinet prout superius continetur volumus insuper & mandamus quatenus intimetis denuntiatis seu intimari & denuntiari faciatis dictæ provincie Cantuar Coepis Decanis Archidiaconis & ceteris prælati Ecclesiarum suprascripti quod eos a personali comparatione in huiusmodi negotio Convocationis & Congregationis dictæ die & loco ut præmittitur divina favente clementia celebrand' excusatos non habere intendimus ista vice nisi ex causa necessariâ tunc & ibid' allegand' & proponend' & per nos approband' sed contumaces eorum qui absentes fuerint canonice punire, & præterea vobis ut supra injungimus & mandamus quod omnibus & singulis Coepis suffraganeis provincie nostre Cantuar injungatis & injungi faciatis ut singuli eorum singulatim de facto suo quatenus pertinet ad eosdem nos seu locum tenentem sive Commissarium unum vel plures dictæ die & horis & loco per literas eorum patentes nomina & cognomina omnium & singulorum per eos respective citatorum continentes distincte certificent & aperte, de die vero receptionis presentium & quid in præmissis feceritis nos aut nostrum in hac parte locum tenentem sive Commissarium huiusmodi dictæ die horis & loco debite certificari curetis per literas eorum seriem una cum nominibus omni-

nium & singulorum Episcoporum provincia nostra Cantuar decanda-
rum Archidiaconorum & ceterorum Pralatorum vestra Diaces in
seperata schedula literis certificatorii annexend^a complectemes in
cujus rei testimonium sigillum nostrum Archiepiscopale presentibus
apponi fecimus, dat in palatio nostro de Lambeth vicesimo octava
die mensis Decembris, Anno Domini millesimo septingesimo & un-
decimo nostreque Translationis Anno decimo septimo.

Tho. Cantuar.

Both these Writs issuing from the Crown at the same Time were a double Tie upon the Clergy to assemble together, that if they should refuse to obey the King's Writ, then they might be obliged to meet by Virtue of the Archbishop's Mandate; and the Popish Clergy usually gave Obedience to that Mandate, because they declined all Dependence on the Crown.

But when they became entirely subject to the Civil Power, as they did at the beginning of the Reformation, then the Provincial Writ alone was thought a sufficient Obligation; and from that Time the Execution of the *Præmunientes* became useless.

'Tis true, it hath been since continued in the Writ to the Bishops, and it is as followeth, viz.

Præmunientes Decanum & capitulum Ecclesiæ vestræ Cantuar ac Archidiaconos totumque Clerum vestræ Dioceſeos quod iidem Decanus & Archidiaconi in propriis personis suis & præd^o Capitulum per unum idemque Clerus per duos Procuratores idoneos plenam & sufficientem potestatem ab istis capitulo & Clero divisim habentes præd^o die & loco personaliter interfint ad consentiend^o iis quæ tunc ibidem de communi consilio dicti regni nostri divina favente clementia contigerit ordinari, &c.

But tho' this Clause is continued in the Writ, the Clergy have not sate in Parliament for some Ages, neither hath it been executed by any Bishop, according to the Tenor of it.

The Archbishop's Mandate was at first very strictly, and is still executed upon the Inferior Clergy, who always choose their Proxies in Obedience to it; and this might be the reason why the *Præmonitory Clause* in the Bishop's Writ was not duly observed; for whilst exact and regular Returns are made by Virtue of that Mandate, there can be no occasion of making any Return upon the *Præmonitory Clause* in the Bishop's Writ: And 'tis probable that this Clause maybe continued to shew the Right of the Crown to summon the Clergy without the assistance of the Archbishop; for tho' *Convocations* have been called here to consult of Ecclesiastical Affairs by Virtue of the Archbishop's Legatine Power, without the King's Writ, yet this was an Usurpation upon the Crown; and when-ever we had a Prince on the Throne who would exert his Right, the People were obedient to him. Our Histories mention that for several Years after the Conquest the Clergy were summon-
ed

ed by the King's immediate Power to attend the great Councils Nationally, that is, at the same Time the Laity were assembled; and tho' they might make some Opposition to such a Summons, when the Regal Authority was eclipsed by the Papal; and would not attend the Parliament Nationally, but in Provincial Synods held under their Archbishop, yet, even those Synods met with the Parliament to consult about their Civil Rights; afterwards, by degrees, they acted as Ecclesiastical Assemblies, and purely about the Affairs of the Church.

But both the Parliamentary and Provincial Writs passed through the Hands of the Bishops, who were to look after the Execution of both; and in this respect they have been called Ecclesiastical Sheriffs; by the one, the Bishop and his Clergy were called to the Parliament; and by the other they were summoned to a Convocation; which in effect was a Summons to Parliament, because both met at the same Time.

Upon the whole Matter, the Inferior Clergy were in those days considered under a double Capacity; one as Members of the State, and as such they sat in the State-Assemblies by Virtue of the *Præmonitory Clause* in the Bishop's Writ; and there they consulted of Temporal Affairs; and of the Interests and Advantages both of the King and People: But when the Parliament was divided into Two Houses, then the Bishops and the Clergy assembled in a Body themselves, and sat in Convocation to consult of Ecclesiastical Affairs, but the Bishops had a Right likewise to sit in the Upper-House of Parliament, not only as Spiritual Prelates; but as they were Barons.

The other Capacity, under which the Inferior Clergy were then considered, was, as they were Ecclesiastical Officers, convened in Synods to consult of Church-Matters; and in this Capacity they were assembled by the *Provincial Writ* to the Archbishop, and the not rightly distinguishing between those Two Writs hath lately occasioned such Disputes concerning their Right of being summoned to sit with the Parliament; for it seems plain, that when they met by Virtue of the *Præmonitory Clause* in the Bishop's Writ, it was necessary they should meet at the same Time with the Parliament, because they were in that Assembly to assist the Civil Government by Taxes out of their own Estates.

But if, by the *Provincial Writ* alone, they had that Parliamentary Power of giving their own Money, this is a very good reason why our Bishops spar'd the Return of the *Præmunientes*, when the Return to the Archbishop's Mandate was as effectual as both: And 'tis very apparent that they have exercised that Power ever since the Reformation to the 15th Year of Car. 2. for during all that Time the *English* Clergy have taxed themselves in their *Convocations*; but in the following Session, in the next Year, they receded from that Customary-Right, and were for that reason discharged from Two of the Four Subsidies given.

by themselves, and then in Arrear, and this made the *Præmunientes* more insignificant: And it was for this Reason, that from the Time before-mentioned the Rectors and Vicars, who were to be taxed for their Spiritual Livings, were allowed to vote in the Elections of the Knights of their Shires to Parliament (which before they did not) that they might still be virtually taxed by themselves.

But when ever the Clergy met together by the *Provincial Writ*, directed to the Archbishop, in order to make Constitutions and Canons, and to consult of Spiritual Affairs, they might be summoned before the Parliament met, and continued after it was prorogued; they were not confined to that very Time when the Parliament sate, for if a *Convocation* must necessarily be Attendant on that Honourable House, then let the occasion be never so extraordinary, it could not be assembled but whilst the Parliament is sitting.

But when they were under a *Præmunire* they submitted themselves to the King, and their Power is now limited by Act of Parliament, 25 H. 8. cap. 19. viz. That being assembled in *Convocation*, they are not to confer together to make any Canons without the King's License; and if upon such License and Conference they agree on any new Canons, they cannot execute the same without the like License; nay, if the King gives his Consent, they cannot be executed, but under these Limitations:

1. Such Canons must not be against the Queen's Prerogative.
2. Nor against any Statute, or against the Common Law.
3. Nor against the Customs of the Realm.

Courts Ecclesiastical.

IN the Time of our Saxon Ancestors, one of the principal Inhabitants of the Hundred, who was called the *Alderman*, together with the Free-holders thereof, were Judges of the Hundred-Court, which was then called *Centuriata*, because it had Jurisdiction over 100 Towns or Villages.

In this Court, as likewise in the Sheriff's Tourn, not only the Temporal but Ecclesiastical Causes were determined; and for this purpose, as has been observed before, (under the Title *Consistory-Court*) the Bishop or his Archdeacon sate there in Person till the Reign of H. 2. and then this mix'd Jurisdiction came to be divided.

And since this Division, it hath been a Question, Whether these Ecclesiastical Courts should issue out Procefs in their own Names, as they usually do, or whether they ought to do it in the Queen's Name? And it hath been objected, that they ought to do it in the Queen's Name; because, by the Statute of 1 Ed. 6. cap. 2. 'tis enacted that all Ecclesiastical Procefs shall be in the King's

King's Name, and the *Teste* in the Name of the Ecclesiastical Judge: And the Occasion of making that Act was that Jealousy which remained, that Bishops acted by the Authority of the Pope and not of the King.

'Tis true, this Act was repealed by 1 *Maria*, cap. 2. but that Repeal was taken away by the Statute 1 *Jac.* cap. 25. so that the Statute 1 *Ed.* 6. stands revived, and by consequence the Process ought to be in the Queen's Name.

This Matter was revived with great Clamour, *Anno* 13. *Car.* 1. at which Time there were several libellous Books and Pamphlets published, wherein the People were told, that it was inconsistent with that King's Supremacy for the Bishops to keep Courts in their own Names; whereupon, by an Order from the Court of *Star-Chamber*, it was referred to all the Judges of *England* for their Opinions, who, on the First Day of *July*, *Anno* 1637. certified under their Hands, that it was not necessary that Ecclesiastical Process should be in the King's Name, and that the Statute 1 *Ed.* 6. which enacted the contrary, was not then in Force: And my * *Lord Coke*, who published his *Second Institutes* about Five Years after this Resolution, tells us the reason of it, *viz.* That it is true, when an Act of Repeal is repealed, the first Act, which was repealed is revived, for *Remoto impedimento reviviscit Statutum*; yet the Statute 1 *Jac.* is not the only Act by which the Statute 1 *Edm.* 6. is repealed, but 'tis likewise repealed by *Implication*, tho' not expressly by the Statute 1 *Eli.* 1. for that Act revives the Statute 25 *H.* 8. in express Terms, which was repealed by 1 *Ed.* 6. for as by repealing a Repeal, the first Act is revived; so by reviving an Act repealed, the Act of Repeal is made of no Force.

By which Statute 25 *H.* 8. it was enacted, *That Bishops might do and execute in every thing as they formerly had done, according to the Customs and Laws of the Realm*: Now, before that Statute, they did send out Process in their own Names, by Virtue of that Authority which they had by the Laws of the Realm; for the Ancient Episcopal Jurisdiction here, was not derived from the Pope, but the Bishops acted in their own Names as Ordinaries, and never under the Pope; but when they were delegated by Commission from him in some special and extraordinary Cases.

And this was never counted any Derogation to the Prerogative of those Princes, who were the most jealous of the Supremacy, such as *H.* 8. Queen *Eli.* &c. especially since that Statute, which annexes the Ecclesiastical Jurisdiction to the Crown, doth likewise oblige every Bishop to take the Oath of Supremacy.

* 2 Inst. 686.

And 'tis to be observed, that the Controversy in those Days was not between the King and the Bishops, but between him and the Pope; for when the Bishops owned the Supremacy to be in the King, and refused Obedience to the Authority of the Pope, there was little regard in whose Name the Ecclesiastical Process issued.

I shall conclude this Title with a few Observations of what is usually done in these Courts, viz.

These Courts appoint Curators or Guardians for Infants, to take care of their Estates, and therefore they may take Security by Bond of such Guardian for the Performance of his Trust, but then the Infant must have a personal Estate only, and no Lands, and the * Bond must be taken in the Name of the Bishop alone: This was the Opinion of my Lord *Hales*, tho' the Practice is otherwise; but 'tis a Question, Whether such a † Curator can maintain a Suit in the Ecclesiastical Court for the Custody of the Person of such Infant?

These Courts may likewise hold Plea for a Thing prohibited by a || Statute under a Penalty, so they do not proceed for the Penalty; and therefore they may proceed against a *School-master* for keeping a School without a License from the Ordinary; for tho' the * Statute 13 Car. 2. gives the Penalty of 5 l. against any School-master who shall teach without License, yet this is likewise an Offence against the Canons.

And lastly, 'Tis the constant Practice of those Courts to receive Pleas in Civil Causes upon † Oath, tho' it hath been objected, that they ought not to require an Oath, *Nisi tantum in rebus Testamentariis & Matrimonialibus*; and therefore, where a Suit was in the Spiritual Court against the Defendant for standing in the Church with his Hat on, he was compelled to put in his Answer on Oath.

Councils.

THE learned Bishop *Prideaux*, whom I shall follow in treating on this Subject, hath defined a Council thus:

'Tis a Publick Ecclesiastical Meeting, especially of Bishops and other Doctors, lawfully assembled and deputed by several Churches.

Their Business, when assembled, is not to determine any Political Affairs or Private Differences; but they are to examine Ecclesiastical Causes, in which the Scriptures are to be their Rule, by which they are to settle Matters of Faith; and they are to settle Matters of Practice by Presidents; and those things which concern Discipline by Decrees and Constitutions.

* 2 Lev. 163. † 2 Lev. 217. 3 Lev. 72. || 2 Lev. 222.
* Cap. 19. † 2 Lev. 247. 1 Vent. 339.

Councils are divided into *Judaical*, *Apostolical*, *Oecumenical* and *National*: Of all which I shall give a very short Account, and of the most material Affairs which were transacted in them.

The *Sanedrim Gedolah* cannot be comprehended under the Title of a *Judaical* Council; tho' this was the great Council of the *Jews*, and consisted of 72 Elders, who always sate at *Jerusalem*, till *Gabinus* the Proconsul of *Syria* divided it into Five Parts, and then it sate in Five distinct Places

Neither can the *Sanedrim Kethannah* be accounted among those Councils, which was a lesser Assembly, consisting of 23 Persons, and the Reason in both Cases is, because Civil Matters were determined in these Councils, for the Affairs of Peace and War, the Choice of Magistrates for inferior Cities, and such like temporal Things were the usual Business of the great Council: And when there was a full and compleat Number in the lesser Council, then they had Power to hear and determine all Capital Offences; and to this our Saviour alludes, when he advised his Disciples to beware of Men, for they would deliver them up to Councils, and scourge them in their Synagogues; where by the word Councils he meant the Civil, and by Synagogues the Ecclesiastical Judicature.

But those Assemblies, which may properly be called *Judaical* Councils, were such as the Tribes and Elders which were assembled by (a) *Joshua* at *Shechem*, to root out strange Gods, and to prohibit all manner of Conversation with the *Gentiles*.

Such was the Assembly of the Prophets on Mount *Carmel*, under (b) *Ahab* and *Elijah*, where the Prophets of *Baal* were first convicted of false Worship, and afterwards put to Death; and the true Worship of God was miraculously confirmed by Fire from Heaven, at the Prayer of *Elijah*, which consumed the Sacrifice he had prepared on the Altar.

Such was also the Assembly of the (c) Priests and Levites of *Jerusalem*, under *David*, who was at that Time assisted by *Gad* and *Nathan* to determine the Number of Levites, and to debate about the Offices of the Priests, and to take Measures for their Distribution into several Ranks and Degrees.

Such was also another Assembly of (d) Priests and Levites in the East-Street of *Jerusalem*, under the good King *Hezekiah*, for cleansing the Temple from Idolatrous Worship, and to offer Praises unto the Lord, as *David* had done before him.

Such was another Assembly of the like (e) Persons at *Jerusalem*, under *Josiah* and *Hilkiah* the High-Priest, where the Temple was again purged from Idolatry.

And lastly, Such was that Assembly met in the same City, under *Zorobabel* and *Ezra*, who returned from the Captivity of *Babylon*, and set the Canonical Books of the Old Testament

(a) *Joshua* 24.
(d) 2 *Chron.* 19.

(b) 1 *Kings* 18.
(c) 2 *Chron.* 34.

(e) 1 *Chron.* 13.

in the same Order we have them; and some other Acts were begun and prosecuted in this Council, as particularly the *Mosaic* and *Hebrew* Points, for preserving the *Hebrew* Language, in which those Books were written, that the same might be truly transmitted to Posterity.

Apostolical Councils.] The Apostolical Councils may be reduced under such which were assembled against the Apostles, and by them.

Those which were assembled against them was by (f) *Annas* the High-Priest, *Caiphas*, *John*, and *Alexander*, and as many more as were of Kin to the High-Priest; and this was to suppress the Gospel in its very Infancy; for they made a Decree that none should speak or teach in the Name of Jesus.

The same Persons were re-assembled with the *Sadducees*, who committed the (g) Apostles to Prison, from which they were miraculously delivered by the Angel of the Lord; then there was a design to put them to Death, which was diverted by the Speech of *Gamaliel*, who told the People, that if what the Apostles did was of their own Heads it would come to nothing, but if from God it would stand.

In a Synagogue of the (h) Libertines (who were the Sons of such Jews who were free Denizens of Rome) *Stephen* was accused by false Witnesses, and afterwards put to Death.

In another Council of Pharisees and Sadducees, assembled under *Ananias* the High-Priest, *St. Paul* was smitten on the Face, and had been tore to pieces by the Rabble, if *Claudius Lysias*, the chief Captain, had not Rescued and brought him to the Castle; and he was not very safe there, for the Captain conducted him from thence to *Cesarea*, and delivered him to *Felix*, who kept him Prisoner in *Herod's* Judgment-Hall.

But the Councils which were assembled by the (i) Apostles were, first, that of 120 Persons under *Peter*, to substitute an Apostle in the room of *Judas*, who had betray'd our Saviour, and the Lot fell upon *Matthias*.

There was another, consisting of a multitude of Disciples assembled by the (k) Apostles to choose the Seven Deacons.

In another the (l) Apostles and Elders were assembled at *Jerusalem* to determine that Question which was so warmly disputed between *Paul* and *Barnabas*, Whether the Gentiles converted to Christ, and living amongst the Jews, should be circumscised and observe the Ceremonial Law? And it was determined in the Negative, because Justification might be obtained by the Grace of God alone in Christ.

This Determination is by some Modern Divines called a Canon, made pursuant to the Decision of the Controversy between those Two Apostles, and 'tis produced as an Instance

(f) Acts 4, 6. (g) Acts 5, (h) Acts 6, (i) Acts 1, (k) Acts 6. (l) Acts 15,

to shew that the Holy Ghost directed this Method for the Church to proceed in future Ages, in order to make Ecclesiastical Laws, viz. That Spiritual Persons meeting together, and consulting about Matters which occasioned those Meetings, should have full Power to make such Canons, which in their Opinions should most conduce to the Glory of God, and the Good of those Souls committed to their Charge.

Such was the Meeting of the Brethren assembled at *Jerusalem*, under (*m*) *Paul*, where the Converted Gentiles were allowed to observe some Parts of the Ceremonial Law for a Time, that by such an Example and Condescension the weaker might be gained.

And lastly, Such was the Assembly of the Apostles met together to compose the *Creed*, tho' some doubt whether they ever met for that Purpose; and also that Meeting wherein 84 Canons were made, which pass under the Name of the Apostolical Canons.

After the Empire became Christian, some of the good Emperors thought it requisite to call all the Bishops within their Dominions to one Universal Assembly, to consult of Proper Methods to preserve Unity amongst Believers, and to defend the Established Faith; and these were called General Councils, of which there were Seven very famous in the *Greek* or *Eastern* Church, and as many in the *Western* Church.

Documental or
General Councils.

Those of the *Eastern* Church were

| | | | | |
|-----------|---|----------------------------------|---|----------|
| The first | { | <i>Nicene</i> | } | Council. |
| | | <i>Constantinopolitan</i> | | |
| | | <i>Ephesine</i> | | |
| | | <i>Of Calcedon</i> | | |
| | | <i>Of Constantinople the 2d.</i> | | |
| | | <i>Of Constantinople the 3d.</i> | | |
| | | <i>Nicene the Second.</i> | | |

The first *Nicene* Council consisted (*n*) of 318 Bishops; of which old Bishop *Hofius* was President, and *Potoman* and *Paphnutius* were his Assistants in this Council; the Heresy of *Arius* was condemned, who denied the Son to be coeternal and coessential with the Father; and that Difference which was between the *Eastern* and *Western* Churches about the keeping the Feast of *Easter*, together with those Schismatical Disputes of the *Meletians*, and of the *Novatian* Hereticks were condemned; and in this Council the good Emperor burnt all the Accusations which the Bishops had wrote against each other as unworthy to be seen.

(*m*) Acts 21. (*n*) A. D. 235.

The

Constantinople The first Council assembled at *Constantinople*, under *Gratian* and *Theodosius*, consisted of 150 Bishops, in which *Cyril* Bishop of *Jerusalem* was President; these condemned *Macedonius* for denying the Divinity of the Holy Ghost. The Emperor made all Confessions void, except those wherein Christ was acknowledg'd to be coessential with the Father; and this is still retain'd in our Liturgy, in the *Nicene Creed*, which some are of Opinion was compos'd by *Gregory Nazianzen*; but those Words (*the Son*) which confirm the Holy Ghost to proceed from the Father and the Son, were added by Pope *Benedict* the Seventh.

Ephesus 1st. A. D. 434.] The first Council of *Ephesus* was assembled under *Theodosius* the Younger, it consisted of 200 Bishops, of which *Cyril* of *Alexandria* was President; it condemned *Nestorius* of *Constantinople*, who, instead of Two Natures, acknowledg'd divers Persons in Christ, for which he was banish'd, and afterwards Blaspheming, his Tongue was eaten with Worms, and so he died.

The Writers of Ecclesiastical History tells us, that St. *Cyril* was a great Enemy to *Nestorius*; that this Council was a tumultuous and rash Assembly of some Bishops of *Asia* and *Egypt*, and that it was a very hasty Judgment which was pronounc'd against him; for it was done at one Sessions, without staying for the Oriental Bishops, for the Pope's Legate, and for the Bishops likewise of the West, that it was given in great Heat and Passion, and notified with Reproachful Words, viz. to *Nestorius* the new *Judas*.

But as soon as the Oriental Bishops came, which was Five Days after the Sentence given against *Nestorius*; they held another Council, in which *John* of *Antioch* was President, and they deposed St. *Cyril*.

They tell us likewise that his Tongue being eaten by Worms, is an Invention of a Nameless Author, found by *Evagrius*, who relates this Story, and the rather because 'tis a very usual Thing to suppose that Hereticks come to some Tragical End.

But there are some of Opinion that *Nestorius* was not a Heretic, and that he and St. *Cyril* were both Orthodox; for the Controversy between them was a Dispute about Words concerning the *Virgin Mary*, the one allowing her to be the Mother of God, the other the Mother of Christ, but not of God; so that by this Means he was accused to be against the Hypostatic Union, as if the Mother of Christ was not the Mother of God.

Calcedon.] The Council of *Calcedon* was assembled by *Marcianus* the Emperor, who was likewise President of it; there were 630 Bishops, who condemn'd the Heresy of *Eutyches* and *Dioscorus*, but this last was afterwards received into Favour; and *Theodoret*, who, in Compliance to *Nestorius*, had condemn'd the *Anathema* of *Cyril* of *Alexandria*, was upon his Recantation restored to his Bishoprick.

Constantinople 3d. A. D. 680.] The Third Council of Constantinople was assembled by the Emperor *Constantine Pogonatus*, it consisted of 150 Bishops, of which that Emperor was President; in this Council the *Eutychian* Heresy was condemn'd, and *Macarius*, the chief Promoter of it, brought several false Copies of Books, to maintain that there was but one Will in Christ, which old *Polychronicus* ridiculously endeavour'd to confirm by a Miracle, in raising one from the Dead: In this Council 'tis commonly said, that 102 Canons were made, but never ratify'd, because they were added by the Fathers in the *Trullo*, which is a vaulted Cloister in the Imperial Palace; and this was above 227 Years after that Council was held.

Second Council of Nice.] The Images, Statues and Relicks, which were broken to Pieces by *Constantine*, *Copronymus* and *Leo Isaurus*, were restor'd by their Son and Grandson *Constantine*; in the Second Council of *Nice*, which was held under him, in which 350 Bishops were assembled, and Image-breakers were condemn'd as Hereticks, this Distick is attributed to that Council.

*Id Deus est quod Imago docet, sed non Deus ipse;
Hanc videas, sed mente colas quod cernis in ipsis.*

There were likewise Seven Latin Councils held at *Ariminum*, *Lateran*, *Lyons*, *Vienna*, *Florence*, *Lateran* 2d. and *Trent*.

Ariminum. A. D. 369.] The first at *Ariminum*, where there were 400 Bishops in this Council, the *Nicene* Creed was order'd punctually to be observ'd.

Lateran.] The first Four *Lateran* are comprehended under one, as more favouring the Popish Dissention than the Doctrine or Discipline of the Church; it is call'd the *Lateran Council* from the Place where it was held, which was formerly the House of *Plautius Lateranus*, who was banish'd by *Nero*, and *Constantine* the Great gave this House to Pope *Miltiades*, which has continued as a Palace for the Popes ever since.

The First of these Councils was assembled under *H. 5.* where 300 Bishops were present; and here the Investiture of Bishops with the *Ring and Staff* was taken from the Emperor, and given to the Pope; *Crosses* were also appointed for the War against the Infidels, and those who fought under them had their sins pardon'd.

The Second was held under *Lotharius*, *A. D. 1131*. In this there were 2000 Bishops, who made 30 Canons, all published by *Gratian*, from the *Vatican Library*, by which some Hereticks were condemn'd; and all Persons were made guilty of Sacrilege who receiv'd Tythes, and so incurr'd the Penalty of Damnation; and Usurers were deprived of Christian Burial, and curst to Hell.

The Third was assembled under *Frederick the First*, in which were 300 Bishops, who condemned the *Albigenses* and *Peter Lombard*, and annulled all Ordinations made by Schismatics.

The Fourth was assembled under *Frederick the Second*, and consisted of 400 Bishops, who rejected the Book of *Abbot Joachim* against *Peter Lombard*, and condemned the Follies of those who denied Transubstantiation; this Council exacted Money from the Temporal Magistrates to extirpate such whom the Pope had adjudged Hereticks, and granted many Indulgencies to those who went with *Crosses*, commanded by *Godfrey of Bulloigne*, to recover the Holy Land; and lastly, it prohibited Pluralities of Benefices.

The said *Frederick*, the Second *A. D.* 1244. assembled another Council at *Lyons*, in which he was deposed by Pope *Innocent* the Fourth, who presided there; the Fifth of all Ecclesiastical Revenues were given for the Recovery of the Holy Land, the Scarlet Hat was given to the Cardinals, and Feasts were instituted for Popish Saints.

The Second at *Lyons* was assembled under *Rodolphus*, *A. D.* 1272. in which there were 700 Bishops, who compelled *Mickael Paleologus*, with his *Greeks*, to subscribe that the Holy Ghost proceeded from the Father and the Son; but returning Home they recanted it: This Council sent for *Thomas Aquinas*, but he died in his Journey thither; they gave the Tenth of all Ecclesiastical Revenues for Six Years, for the Recovery of the Holy Land: Here the bowing at the Name of Jesus was order'd, and in this Council 36 Constitutions were made, which are to be found in the Sixth Decretals.

At *Vienna* a Council was held under *H. 7.* in which were 300 Bishops, who encourag'd the Expedition to *Jerusalem*, and suppress'd the *Knights Templars*, under a Pretence that they had murder'd the Emperor of the *Abyssines*, and for that they were Hereticks; but *Trithemius* tells us, the true Cause was, because they were Rich; and this appears by a Constitution they made, that none should enter into that Order, unless he first surrender the Goods of the ejected *Templars* to be disposed by the Pope.

The Constitutions made in this Council are call'd the *Clementines*, and are a Supplement to the Canon Law; and amongst the rest, there is that famous Decree for constituting Professors of *Hebrew*, *Arabick*, and the *Oriental* Languages at *Oxford* and other Universities, to the intent that the *Jews* and *Mahometans* might, by this Means, be the more easily converted to the Christian Religion.

Florence. A. D. 1431.] The Council at *Florence* was begun at *Ferrara*, under the Emperor *Albericus*, but adjourn'd to *Florence*, in which were 141 Bishops, and the Pope himself was President; they depos'd the Council of *Basil*, and debated the Articles concerning the Proceeding of the Holy Ghost; as also several

several other Things concerning Transubstantiation, the administering unleavened Bread in the Sacrament, the Pope's Supremacy; to which all the *Greek* Bishops and Doctors there subscribed, amongst whom was *John Paleologus*, and *Joseph* the Patriarch.

Lateran 5th. A. D. 1512.] The Fifth *Lateran* Council was held under *Maximilian* the First; it consisted of 114 Bishops, who disannull'd all the Acts of the Council of *Pisa*, and exploded the Pragmatick Sanction, which was made in the Council of *Basil*, in defence of the Ecclesiastical Liberties, against the Encroachments and Usurpations of the Church of *Rome*; the Immortality of the Soul was asserted, Preachers were prohibited to pervert the Scripture to strange Opinions, and Books were not to be printed without the Approbation of learned Men.

Trent.] The Council of *Trent* was assembled by the Emperor *Charles* the Fifth, and sat 18 Years; in this there were 25 Sessions, in which the successive Popes, by their Deputies, were President; for it continu'd, during the Pontificate of *Paul* the 3d. *Julius* the 3d. and *Paul* the 4th. in the Reign of the Two first of those Popes, Original Sin, Justification by Faith, the Sacraments in General, and Baptism in Particular, Repentance and Extreme Unction were discussed; in the Reign of the last the Communion of Lay Persons under one Kind, the Sacrifice of the Mass, Orders, Matrimony, Purgatory, worshipping Relicks, Invocation of Saints and Images, Indulgences and other Things of this Nature were debated and settled.

This Council granted safe Conduct to Three Protestants, that they might be present there to offer Reasons for their dissenting from the Popish Religion; but they were not to pretend to reform any Thing, but to be instructed.

I find by the Writers in those Times, that this Assembly was never admitted by the *French*, nor very much esteem'd by the more learned Papists; it was wholly rejected by *Kennisius Gentileius* and *John Calvin*: The learned *Father Paul* has publish'd the History of it, by which it will appear to those who consult that History, that it was an Assembly only to impose on the Christian Religion, and not to moderate any Differences in it; and therefore might well be call'd a sacred Delusion of Christian Princes and Christianity it self.

Controverted Councils.] As to the controverted Councils, they are reduc'd by *Bellarmino*, under a peculiar *Classis*; some of which were approv'd, and some rejected; so that if this Distinction is admitted, then a Council will be no more than a meer Device of the Pope, to admit and refuse what he thinks fit, under the Colour of Religion, but really for establishing his Authority and Supremacy.

The controverted Councils are likewise Seven; At *Constantinople* 4th, *Sardica*, *Syrmia*, *Quinisext*, *Frankfort*, *Constance* and *Basil*.

Con-

Constantinople 4th, A. D. 870.] That at *Constantinople* the 4th was assembled under *Basilus*, it consisted of 102 Bishops, who discharg'd *Photius* the most learned *Greek* Patriarch, and it was either for writing against the Usurpation of the Pope; or for being an Enemy to Images; but tho' this Council bestow'd great Honours on Images, they made one very good Canon, by which they prohibited the using Popish Garments at Comedies or Interludes. There hapned one Thing very remarkable in this Council, viz: The *Bulgarians*; being newly converted to Christianity, could not tell whether they should communicate with the *Eastern* or *Western Church*, but by their Ambassadors advis'd with this Council about it; the *Romans* having magnify'd the Authority of the Pope; and the Ambassadors having some Encouragement, and being protected by the Emperor, behav'd themselves in a very Proud and Haughty Manner towards the Patriarch and all the *Greek* Bishops; but as they return'd home they were assaulted by the *Slavonians*, and the Authentical Copy of this Council was taken from them; but *Anastatius* the famous Library-keeper; who was present at it, hath transmitted the Remains thereof to Posterity:

The *Greeks* reject this Council, and *Bellarmino* affirms, that what we have from *Anastatius* is suppositions and uncertain.

Sardica, A. D. 351.] The Council of *Sardica* was assembled under *Constantinus*, in which were 376 Bishops, of which *Hosius* was President, 300 of these were *Western* Bishops, who confirm'd the *Nicene Creed*; but the other 76 were *Arians*, who meeting at *Philopopolis* confirm'd *Arianism*, and made 21 Canons; but not one concerning the Pope's Supremacy; or Appeals to him from remote Churches.

'Tis true, some of them do approve Appeals from *Rome*; but only by the Subjects of that Patriarchship, and even in such Case they do not approve them as necessary, but Arbitrary only.

Epymta, A. D. 356.] The Council of *Syrma*, in which there were 300 Bishops of the *West*, and some of the *East*; was assembled to hear and determine the Cause of *Photinus*; who complain'd that he was unjustly condemned in the Council of *Sardica*, for preaching that Christ was mere Man, and inferior to his Mother: In this Council, *Hosius*, who was President of the Council at *Sardica*, and now almost an hundred Years old, was compelled by whipping to subscribe to *Arianism*, which, as old as he was, he recanted before he died.

Quinisext, A. D. 692.] The Council of *Quinisext* was held under *Justinian* the 2d. *Balsamon* and our *Bede* account it Erroneous; but because some former Synods had ratified nothing concerning Ecclesiastical Discipline: This Council confirmed above 100 Canons made in the *Trullo*; and because by the 36th Canon the Patriarch of *Constantinople* is made equal with him at *Rome*; and by another Marriage was allow'd to the Clergy; therefore

therefore the *Latins* rejected it, yet some of those Canons, as particularly that against breaking Images, were put in Use by Pope *Gregory* the 2d. and *Adrian* and *Gratian* tells us, that they were all receiv'd by the *Nicene Synod*.

Frankford, A. D. 794.] 'Tis not agreed whether the Council assembled at *Frankford* was a general or a Provincial Council; some will have it to be a general Council, because it was assembled by *Charles* the Great; but others will have it to be Provincial, because it condemned Images; and that again is denied by *Binus*, for he tells us, that it confirm'd the Decrees of the Two *Nicene Councils* concerning the Worshipping Images; it was assembled to condemn that Heresy spread abroad by the Archbishop of *Toledo*, and the Bishop of *Aurelia*, who declared that Christ was only the adopted Son of God; but the learned Cardinals, *Bellarmino* and *Baronius*, tell us, that what this Council did was not much to be regarded.

Constance, A. D. 1414.] The Council of *Constance* was assembled under *Sigismund*, in which there were 1000 Bishops and Doctors to compose those Schisms which had been between the Two Popes of *Avignon* and *Rome*; this Council depos'd *John XXIII.* and exalted *Martin V.* to the Popedom; they condemn'd 45 Articles of *Wickliffe*, and order'd his Body to be taken out of the Grave and burnt: In one of these Articles they tell us that he affirm'd, *Deus debet obedire Diabolo*, when in Truth it was *Deus dedit obedire Diabolo*; they order'd *John Hus* and *Jerome* of *Prague* to be burned; they affirm'd the Council to be above the Pope; that Faith was not to be kept with Hereticks; they denied the Cup to the Laity, which made the *Bobemians* protest against them, and declare that they were *Hussites*, and that they would defend the Law of Christ with their Lives and Fortunes.

It was about this Time that the Question was mov'd, whether a Council was above the Pope, or he above the Council? And at the same Time 'tis observable, that another Question arose, whether the Pope was infallible or not? Which was a Doctrine unknown in the Church for 1400 Years; but now a Decree was made, that the Pope is subject to the Authority of a General Council, and this is founded both in Scripture and Reason; for our Saviour never gave Ecclesiastical Power to *St. Peter* alone, but to the Church; or in other Terms, to his Apostles and their Successors, that is, to Bishops assembled in General Councils; and certainly 'tis agreeable to Reason, that their Decisions, in Matters relating to the Catholick Faith, should be more infallible, than any Determinations of the Pope, or any other Single Person whatsoever.

'Tis true, the Pope hath assum'd the Name and Title of Head of the Universal Church, and a Right and Power to call such Councils, and to preside in them when called; and also to adjourn and dissolve them; and not only so, but some of them have

have received Appeals, and granted Dispensations to the Decrees of Councils.

But this is an Usurpation condemned by this Council, and by that of *Pisa* before, and *Basil* afterwards; which Councils have determined, that General Councils are above the Pope, because they represent the Universal Church, which one Man cannot do; this was the Opinion of Pope *Alexander V.* and of many of his Successors; and so it hath been determined by several Universities and Faculties of Divinity; for it was the constant Practice of the Church, in the Primitive Times, to have recourse to a General Council, as often as any Important Controversy happened, either in Matters of Faith or Discipline, by whose Decrees even the contrary Determinations of Popes in the same Things have been reversed and made void.

Basil.] The Council of *Basil* was called also by *Sigismund* the Emperor, of which Cardinal *Julian* was President; and in this Council not only Bishops but other learned Men had Votes, which was not permitted by former Councils. Here Pope *Eugenius* was deposed, and the Duke of *Savoy*, who had lived an Hermit's Life, was advanced to the Popedom, by the Name of *Felix V.* They decreed the Council to be above the Pope and all others, and that he could not Dissolve, Prorogue or Remove it, being once lawfully Assembled, and that whoever denied this was an Heretick.

But the deposed Pope assembled another Synod at *Ferrara*; which afterwards removed to *Florence*, as hath been already observed; and there he sided with the *Greeks*, and deposed the Council of *Basil*; and at the same Time they of *Basil* confirmed the *Pragmatick Sanction*, condemned *Nepotisme*, suppressed Concubines, prescribed the Means how *Jews* might be converted to Christianity, declared the Blessed Virgin to be Immaculate, and granted the Cup to the Laity; but *Felix* renouncing the Popedom, *Eugenius* was satisfied and reconciled.

This Council was condemned by another assembled under Pope *Leo X.* as Schismatical, but it was commended by *Aneas Sylvius*, who was present at it, and afterwards made Pope by the Name of *Pius II.* but as soon as he was advanced to that Dignity he changed his former Opinion: However, we are told that there is an undoubted Copy of this Council in the Publick Library in *Oxford*.

Rejected Councils.] The Councils which are rejected are those which raised Heretical Opinions, or made any Schisms in the Church; and of these there were likewise Seven in Number, At *Antioch*, *Milan*, *Seleucia*, *Ephesus*, *Constantinople*, *Pisa* 1. *Pisa* 2.

Antioch, A. D. 340.] In the Council of *Antioch* the good Bishop *Athanasius* was banished, but being restored by *Constantius*, this was held unlawful by the *Arians*, because it ought to be done by the same Authority by which he was ejected: The
Matter

Matter was referred to Pope *Julius*, who summoned a Synod to appear at *Rome*, but *Constantius* being persuaded to be at the Consecration of that Magnificent Temple which was built at *Antioch*, by *Constantine* the Great, there met 90 Bishops; of which 30 were *Arians*; and tho' the rest were Orthodox, and voted for the Restoration of *Athanasius*, yet he was condemn'd by the other with the Concurrence of the Emperor.

In this Council a Creed was composed, intermix'd with many Errors; and the 25 Canons which were made in it do rather concern the Discipline than the Doctrine of the Church.

Milan, A. D. 355.] The Council of *Milan* was assembled under *Constantine*; it consisted of 300 Bishops, the Emperor himself being President, who accused *Athanasius* in Person; and the *Western* Bishops, then present, would have consented to the Accusation, if the *Arians* would have subscrib'd to the *Nicene Creed*, which the chief of them refus'd to do. Then follow'd the degrading of Bishops, and several corrupt Ecclesiastical Determinations; so that this Council might rather be call'd an Assembly of wicked Persons, than a Convention of Christians.

Seleucia, A. D. 363.] The Council at *Seleucia* was assembled under the same *Constantine*.

In the Second Council of *Ephesus* there were 128 Bishops, of which *Dioscorus* of *Alexandria* was President; this Council was assembled to condemn the Heresy of *Eutyches*, who affirmed that the Flesh of Christ was not like ours, but fell from Heaven like the Rays of the Sun, and pierced the Virgin's Womb; so he denied Two Natures in Christ Incarnate, and affirmed that his Flesh was changed into a God: But *Dioscorus* influencing this Assembly *Eutyches* was absolved, and those Bishops who oppos'd it were discharg'd of their Places; and *Flavianus*, who was the most violent in opposing it, was trodden to Death, and the rest subscrib'd very unwillingly; for they were aw'd by the Soldiers, insomuch that this was call'd the Synod of Thieves, and what they did was again undone by the famous Council of *Calcedon*.

Constantinople, A. D. 730.] That Council held at *Constantinople* under *Leo Isaurus*, and another held there under *Constantius Copronimus* were both rejected; for in both the worshipping of Images was condemn'd.

Pisa first, A. D. 1409.] The first Council of *Pisa* is disputed whether it ought to be accounted a general Council or not, or whether it should be rejected? *Bellarmino* himself is very doubtful of this Matter; there were present in it 23 Cardinals, Three Patriarchs, 300 Archbishops and Bishops, 28 Abbots and Priors, and a great Number of other Divines and Ambassadors of Princes; and these met to reconcile the Schism between the Popes of *Rome* and *Avignon*, that is, between *Benedict XII.* and *Gregory XIII.* who both assum'd the Title of
R
Popes

Popes at the same Time, and were both depos'd by this Council, and *Alexander VIII.* advanced to the Popedom. But this was rejected as an Assembly without an Head, because it was call'd by the Cardinals in a Tumultuous Manner, against the Pope's Authority, although that Authority could not well be had at that Time, because there were Two who claim'd a Right to it.

Pisa second.] The other was held at *Pisa*, under *Maximilian* and the King of *France*, where several Cardinals met, who summon'd Pope *Julius* to attend them, but he so little regarded their Summons that he Excommunicated them and the *French King*; and having called an *Anti-Synod* in the *Lateran* Palace, the Cardinals and Bishops of his Party met there, where having made some Excuses for himself in not calling a Synod before that Time, he soon after died, and *Leo X.* succeeded, who continued that *Lateran* Council, and made several Decrees in it, to which the Cardinals at *Pisa* submitted, but the *French King* refus'd; and in Contempt of their Authority coined Money with this Inscription, *Perdam Babylonem*. This Council is likewise rejected by the Pope, because it was call'd in an insolent Manner by his Cardinals, and against his Authority.

National Synods.] I shall now add a few Things concerning *National Synods*, which comprehends the Provincial Bishop of every Archbishops; these are not of that universal Authority as general Councils are, for their Decrees are not binding out of their Limits; but, if conformable to Scripture, and confirm'd by general Councils, they are in force every where.

These *National Synods* are Seven in Number, *African, Britain, Eastern, French, German, Italian* and *Spanish* National Councils.

African Councils.] The *African* Councils were almost 20, of which 15 were held at *Carthage*, and amongst them the Sixth is worthy of Observation, by which the Subtilties of the Pope were discover'd, in obtruding a Suppositious Canon of the *Nicene Council*, for receiving Appeals: In the Synod of *Melivitis* *Pelagianisme* was confuted; and in the Synod of *Hippo* the Canons of other Synods were collected.

British Councils.] Amongst the *British* Councils the most famous were held at *Winchester*, under King *Edgar*, the Archbishop *Dunstan* then present, where a Wooden Cross gave a Vote against the Marriage of Priests, if we believe the Monks who report this Story.

Another at *Oxford*, under *Stephen Langton*, who divided the Bible into Chapters: Another at *Clarendon*, under *Hen. 2.* in which *John of Oxford* was President; in this Council 16 Constitutions were made, which the Romanists condemn.

Eastern Councils.] Under the *Eastern* Councils the *Greecian* are comprehended. At *Constantinople* there were 33; that at *Ancyra* determined the receiving and rejecting those who fell away;

away; that at *Laodicea* debated the worshipping of Angels; that at *Gangra* was assembled about the Reformation of Manners; and in the *Tyrian* Council, *Athanasius* was troubled and discharged.

French Councils.] In *France* there were held 13 Councils; in all which Sacrilege and Sacrilegious Persons were condemn'd. At *Arles* the Clergy were directed what Discipline to observe in the Church.

German Councils.] In *Germany*, there were 9 Synods held at *Cologne*; one in *Bavaria*, concerning the Sabbath; one at *Wormes* concerning Decency in Ecclesiastical Affairs; one at *Mentz*, concerning Ecclesiastical Immunities; another held there against *Godtschalchus*; and in this, Prayers were enjoined for the Emperor and Empress, and the good Estate of Christianity; at *Aquigrante*, there was another concerning Ecclesiastical Orders; at *Erford*, another concerning Feast Days; another at *Dort*, against the *Remonstrants* and *Socinians*.

Italian Councils.] In *Italy* there were 115 such Synods, amongst which we must reckon those the chief which were assembled about the Celebration of the Feast of *Easter*; those which received Penitent Apostates into the Communion of the Church, which the *Novatians* always refus'd; that assembled under Pope *Gelasius* of 70 Bishops, wherein the *Index Expurgatorius* was compos'd, and the Canon Law transmitted to Posterity; the *Simiceffan* Council, in which Pope *Marcellinus* was condemn'd for sacrificing to Idols; that assembled by Pope *John XXIII.* to Crown the Emperor *Sigismund*, but the Solemnity was spoiled by the frequent Appearance of an Owl in the Assembly; that at *Pavia* which excommunicated the Pope, who had excommunicated the Emperor; and that at *Brixia*, which deposed the famous Pope *Hildebrand*.

Spanish Councils. Of the *Spanish* Councils there were 25 held at *Toledo*, in which many Things were religiously decreed, and chiefly against the *Priscillianists*; in that at *Eliberis*, there were 81 Canons made, by which the *Priscillianists* were likewise condemn'd; in that at *Casar Augusta* it was order'd, that no Man should assume the Title of a Doctor, unless he had taken his Degree; in that at *Lerida*, Marriage was prohibited in *Lent*; in that at *Bracara*, the *Manichees* and the *Priscillianists* were condemn'd; in that at *Matifcon*, the Vices of the Clergy were reformed, and the Payment of Tythes urged; in that at *Hispalis*, the Consecration of a Presbyter, by a Presbyter, is condemn'd.

Besides these Assemblies there have been several publick and solemn Meetings of Divines, which may properly be call'd Ecclesiastical Conferences; some of which have been assembled by Authority; and some were arbitrary and voluntary Meetings.

Those assembled by Authority were held at *Marpurge*, *Spird*, *Sindelsbald*; *Intermistican*, *Altenberg*, *Torge*, *Hetaburg*; the Meet-

ings at these Places were to compose the Differences amongst Dissenting Brethren.

At *Wormes, Ratisbone, Poissie, St. Germans, Mompillier, Oxford, London*; these were Meetings of Roman Catholics.

At *Malburne, Wittenberg, Franckford*, by *Lutherans, Calvinists, Zwinglians* and *Anabaptists*. *Remonstrants*, at the *Hague*. *Antitrinitarians, Disciplinarians*, at *Geneva*.

Upon the whole Matter it has been observ'd by some of our * Divines, that nothing more expos'd the Christian Religion, than the Violence, Passion, Malice and Oppression, which prevail'd in those Councils held by *Constantine* the First, and other succeeding Emperors, upon the Occasion of the *Arian* Herefy; and generally speaking, all such Assemblies did signify beforehand that some great and publick Evil was near, which required a Desperate Cure; and therefore it usually happens in such Convocations as in dangerous Diseases, where the Advice of many Physicians is requir'd, who meet in the Sick Man's Chamber from several Parts of the City, and consult and dispute about the Distemper, but seldom agree in the Remedy; then they come to a Majority of Votes, and all their Consultations ending in the Death of the Man, his Misfortune may be engrav'd on his Tombstone, viz. *Turbâ se Medicorum periisse*; so in those Assemblies Men shew their Eloquence in many fine Speeches, and their Cunning in Cabals and Intrigues, but it often happens that the Result is not the effect of Justice and Truth, but of the most powerful Faction amongst them: This was the Opinion of *St. Gregory Nazianzen*, who tells us, that he never knew any of these Assemblies bring Things to a Happy Conclusion, but rather encrease the Evil which they were call'd together to suppress.

Curates.

SINCE in some Cases Pluralities are allow'd, which must necessarily imply *Non-residence* upon one of the Two Benefices; 'tis requisite that a Clergyman in such Case, or if he is old and infirm, should have a Curate to supply one of his Cures.

The common Usage is, that Licenses are granted by Chancellors of the Diocess, and taken (as the Bishop of *Worcester* observes) in the same Manner as *St. Peter* took the Fish, which first came with Money in its Mouth; but this is not only contrary to the Canon, but may be a great Inconvenience to the Church in general; for when so little Care is taken, the People may have a weak and insufficient Person set over them.

Therefore the (a) Canon prohibits Curates to serve in any Place, without Examination and Admission by the Bishop of

* *Wake's* Authority of Christian Princes, fol. 307. (a) Canon 48.

the Diocese, under his Hand and Seal, or by the Ordinary, having Episcopal Jurisdiction; so that the Law requires the Approbation of the Bishop to the Admission of a Curate, and no Incumbent ought to take one without it.

'Tis true, many Licenses are granted without the Bishop's Hand and Seal, which, tho' not void, are irregular, because expressly against the Canon.

And the same learned Prelate tells us, that 'tis a Scandal to Religion and to our Church to put in Curates merely to satisfy the Law; and that the loosest of all the Popish Casuists look upon this as a very great Sin.

Now, 'tis not only necessary, in respect to the Church, that the Curate should be allow'd by the Bishop, who 'tis presumed will approve no other than a Person of tolerable Abilities to officiate in the Holy Function, but 'tis convenient for the Curate himself; for when he hath the Approbation of the Bishop, he usually appoints the Salary too; and in such Case, if there should be any neglect of Payment, the Curate hath a proper Remedy in the Ecclesiastical Court, by a Sequestration of the Profits of the Benefice; but if he hath only a License without the Bishop's Hand and Seal, then if his Wages should not be paid he must bring an Action at Common Law against the Incumbent, in which there are some Niceties which are not required in the other Case; as first, he must prove the Agreement; he must likewise prove that he subscribed the Declaration according to the * Act of Uniformity; for 'tis expressly required by that Act, that every Curate shall do it, or be, *ipso facto*, deprived of his Curate's Place.

These are the Remedies which he hath for his Salary, but before the Statute 29 Car. 2. he hath nothing to do with the Tythes themselves, and therefore Payment to the Curate was no good Discharge against the Impropiator, not for the Reason given by (a) Mr. Noy, viz. That a Curate cannot prescribe against his Master, because he may remove him at Pleasure, which I deny; for if he is licensed by the Bishop, as he ought, he cannot be removed without his Consent; but the Reason is, because he hath a Right only to a Salary or Pension, which may be recover'd as above-mention'd.

But if the Incumbent should die after a Curate is thus appointed, and if the Fruits of his Spiritual Promotion, received during the Time of the Avoidance, are not sufficient to pay his Stipend, then by the Statute 28 H. 8. cap. 11, the next Incumbent is oblig'd to pay it within 14 Days after his Induction.

I admit that such Curate hath no fix'd Estate in his Curacy, but that the Bishop may remove him at Pleasure without any formal Process at Law, tho' the Incumbent cannot; but this is

* 24 Car. 2. cap. 4. (a) Noy 15.

seldom done, especially where the Curates are such who are called *Perpetual Curates*; for, as where the Tythes were *appropriate*, there were *Vicars* call'd *Perpetual*, who were not endowed, but had only *Congruam Portionem* allow'd them by the Bishop; so where the Tythes were *impropriate* and no Vicaridge endowed, as they are in many Places in *England*, the Lay-Impropriator is bound to maintain a Curate to perform Divine Offices, who is call'd a *Perpetual Curate*.

'Tis true, he is no sole Corporation, and therefore cannot take any Benefit of a Devise to him by that Name; but if an Impropriator should devise a certain Portion of Tythes to him, and to all that shall serve the Cure after him; tho' the Curate is incapable of taking by such a Devise, for the Reason above-mention'd, and for that he hath no Succession, yet a (b) Court of Equity hath decreed that the Heir of the Devisor shall be seised in trust for the Curate, for the Time being.

It hath been observed before, that when the Bishop approves the Curate, he usually appoints his Salary, which he might alter or increase, as he saw Occasion; but this must be understood to be before the Statute for * augmenting Vicaridges and Curacies, for since that Statute these *Perpetual Curates* have a more fix'd and establish'd Right to their Salaries; for many Ecclesiastical Persons and others, since the Restoration, have, upon renewing their Leases of Tythes, reserv'd more than the ancient Rents, on purpose that the same might be applied to improve poor Vicaridges and Curacies.

But because such augmented Rent was not in some Leases made payable to the Vicars and Curates themselves, therefore the Statute provides that as well when 'tis made so payable, as where 'tis reserv'd by Way of Encrease to the Lessors, but intended for the Benefit of the Vicar or Curate, that it shall continue during the Lease and afterwards, in whose Hands soever the said Tythes shall be, and they shall be chargeable therewith, whether the same is reserved or not?

For, by that Statute, the Curates are declar'd to be in the actual Possession of such augmented Rents, for the Use of themselves and their Successors, and may distrein, or have an Action of Debt to recover the same; so that they have a Right by this Statute to such Salary, and cannot be depriv'd of it at the Pleasure of the Bishop, tho' the Curate is licens'd *Ad nostrum duntaxat beneplacitum duraturum*. Therefore, like other Incumbents, they must be depriv'd by due Course of Law.

And accordingly, *Anno 34 Car. 2. ibe* † *Dean of Lincoln*, having made a Lease for Three Lives of the Rectory of *Mansfield*, reserving a Rent to himself and his Successors, and the Lessee having covenanted to find a Curate, such as the Dean should approve, and to pay him 40 Marks *per Annum*; the Curate,

(b) 2 Vent. 349. * 29 Car. 2. cap. 8. † 3 Lev. 82.

who was nominated by the Lessee, approved by the Dean, and licensed by the Bishop to the Curacy of the Church of *Mansfield*, brought an Action of Debt for a Year's Pension, and recovered it.

But a Devise to him by the Name of *Curate*, &c. is void in Law, because he is not capable to take in such Manner for want of being incorporate; and yet such a Devise of Tythes to him, and to all who shall serve the Cure after him hath been supported in a Court of Equity, and the Heir of the Devisor was *decree'd to stand seised in Trust for the Curate for the Time being.

It hath been a Question, whether the Executors of a Curate may be sued in the Spiritual Court for Dilapidations? Some are of Opinion that they cannot, because he is not properly an Incumbent; for he doth not come in by Institution and Induction, and therefore is not to be charged himself, nor those who represent him.

Cure of Souls.

WHEN Christianity was first Planted in this Nation, the Bishops were constantly resident at their Cathedrals, and had several Clergymen attending them at that Place, whom they sent to preach and convert the People, where there was the greatest Probability of Success, and the Persons thus sent, either returned or continued in those Places, as occasion required, having no fixed Cures or Titles to particular Places; for being all entred in the Bishop's Registry (as the usual Course then was) they could not be discharged without his Consent.

Afterwards, when Christianity prevailed, and many Churches were built, the Cure of Souls was limited both as to Places and Persons.

The Places are those which we now call Parishes, the Extent whereof is certainly known, and the Boundaries are now fixed by long Usage and Custom.

The Persons are the Ministers, who by Presentation, Institution and Induction, are entitled to the Tythes and other Ecclesiastical Profits arising within that Parish, and have the Cure of Souls who live and reside there; and this the Canons call a Cure *In foro interiori tantum*, and they distinguish it from a Cure of Souls *In foro exteriori*, such as Archdeacons have to Suspend, Excommunicate, and Absolve, and which is *Sine Pastoralis Cura*; and from another Cure, which they say is *In utroque simul*, that is, both *In exteriori & interiori foro*; and such the Bishop hath, who hath a Superintendent Care over the whole Diocese, intermix'd with Jurisdiction.

It hath been observ'd by a late learned Prelate, that some People are against these Cures which are thus limited to Pa-

rishes, because they have no Manner of Resemblance to the first Gathering of Churches before the Nation was divided into Parishes; for before that Time, as it hath been already observ'd, the Bishop and his Clergy lived in Common, and they had Liberty of Preaching wherever they were sent or called.

But he tells us, the same Argument may be used against Dominion and Property, because 'tis not agreeable to the Natural State of Community; for Mankind, by an Original and Natural Right, had a Freedom to possess themselves of any Thing which they thought convenient for their Use; but upon encrease of the People great Inconveniencies attended this State of Nature, and then Property came to be established by Division, which was found to be so absolutely Necessary for the Publick Good; that it was not only continu'd in all Subsequent Ages, but strengthened by Laws and Civil Sanctions, in order to punish those who invaded the separate Rights of another, either by Force or Stealth.

And the Case is the same in respect to *Cure of Souls*; for upon the Encrease of Christianity there being many Inconveniencies found in an Unsettled and Ambulatory Clergy, the People being at a great Uncertainty where to go in order to hear Divine Service, and to partake of the Sacraments; when Churches were built and liberally endow'd by our Ancestors, it was then thought necessary to fix a Presbyter in a certain and determinate Place to take Charge of the Cure of Souls within that particular District, where those of his Parish might attend the Service of God, and have Help and Direction in their Spiritual Affairs.

Custom.

TIS for the Publick Good and Peace of Mankind, that a Time should be limited for all Persons to claim their Right, and be excluded for their Neglect, for otherwise Men might be disturbed in their Possessions after many Years quiet Enjoyment, when there is no Possibility either of defending or proving their Right.

Therefore with us here in *England*, an Immemorial Custom hath the Force of a Law, and Mens Rights are established by long and uninterrupted Possessions.

Such a *Custom* is called, by my Lord Coke, one of the Triangles of the Law; but I think, in this, he spoke more like a Mathematician than a Lawyer; for 'tis generally agreed amongst Men of that Profession, that *Custom* is the Foundation of the Common Law.

The learned Bishop of *Worcester* gives an Account of several Ecclesiastical *Constitutions* which are thus founded on *Custom*, and by Consequence are now become Part of the Laws of the Land; such is the dividing the National Church into Two Provinces, and fixing an Archbishop in each, with a Metropolitcal Power

Power and Authority over all Ecclesiastical Persons and Things in each Province.

Such is the ordinary Jurisdiction of every Bishop over the Clergy in his proper Diocese, which some think to be as ancient as Christianity it self; for as soon as Churches were built and planted in this Nation, Bishops were placed over them, and the Clergy, who officiated in those Churches, were accountable to their Spiritual Governors at every Visitation, both for their Living and Behaviour; and the Bishops, who were then the only Visitors, might proceed against them for any contempt of their Authority, or for their Misbehaviour in their several Places.

Such was also the delegated Jurisdiction which is lodged in the Officers of Ecclesiastical Courts, and the Manner of Proceedings therein.

And lastly, Such is the settling the Boundaries of Parishes; for this was not done by the Legislative Power, or by any particular Law at once, but it was begun, continued, and fixed according as Men found it convenient in respect to Places, and as such Divisions seemed just and reasonable to carry on the Purposes for which they were originally designed.

As for Customs of Tything, I shall treat of them under the Title Tythes in the word Custom.

Deacon.

I Do not intend to treat of the Original of a Deacon, which is as ancient as the Time wherein the Apostles lived, and so is the Antiquity of a Deaconess.

This appears from the Title of St. Paul's Epistle to the *Philippians*, which was directed by him to the Bishops and Deacons of *Philippi*, who in those Days assisted the Bishop to inspect the Behaviour of the People, and to take care of the Poor; and *Timothy* tells us what Qualifications were requisite for him who used the Office of a Deacon.

But I shall take notice of him as the third Order of the Clergy, and that he was anciently Ordained in a different Manner from the Presbyters; for a Deacon might be Ordained by a Bishop alone, without the Assistance of the Presbyters.

But he is to be presented by the Archdeacon to the Bishop; all the ancient Formularies agree in this, and the Reason is, because the Archdeacon, having a large Jurisdiction to visit the Diocese, hath by that means an Opportunity to be acquainted with the Clergy, and so to form a Judgment of those who are qualified for this Office.

When Ordained, his Office was to take care of the Ornaments and Utensils of the Church, to receive the Oblations of the People, to distribute the Bread and Wine to the Communicants

cants, to read the Gospels in some Churches, and to Baptize in some Places, and to Preach, but not without leave of the Bishop.

He was likewise to distribute the charitable Gifts of the new Converts, which were plentifully given by them to the Apostles, for the Relief of the Poor; for tho' they might be designed for some higher Ministration, because they were to be Men full of the Holy Ghost and Wisdom, yet this was likewise a part of their Office at their first Institution, and it was occasioned upon the Complaint of the *proselyted Jews* against those who lived in *Judea*, because their Widows were neglected by the Apostles in this Distribution, which took up so much of their Time, that they were hindered in the very Exercise of their Ministry; therefore St. Peter, in a Synod assembled at *Jerusalem*, proposed that they should choose some of good Reputation to dispose of those Alms, and the choice fell upon the Seven Deacons.

Though by our Law he is not capable of any Ecclesiastical Promotion, not so much as to be admitted to a Donative, without being in Priest's Orders; yet he may be a Chaplain in a Family, or a Curate to another, or a Lecturer, but without a Title, and in this respect his Office is a step towards the Ministry, and so it was reputed by the ancient Fathers, and practised in the Primitive Church; for to them it seemed necessary that a Deacon should be a Probationer for some time before he was admitted into Priests Orders, which was usually for the space of a Year, and therefore a Man was to be ordained Deacon at 23 Years of Age, and afterwards a Priest at 24; not that it was ever accounted of absolute Necessity there should be the interval of a Year between the conferring these Orders, for by Canon 32, if the Bishop shall find good Cause to the contrary, a Deacon may be admitted into Holy Orders within that time; but regularly it ought to be a Year, and with great Reason, because in that time it may appear, whether the Person is fit to have the cure of Souls entirely committed to his Charge: But by the same Canon 'tis expressly provided that a Bishop shall not make the same Person both a Deacon and a Priest in one Day.

'Tis true, the Qualification for both these Offices is the same, but there is some difference in respect to their Age; for a Deacon may have a Dispensation for entring into Orders before he is 23 Years Old, and 'tis Discretionary in the Bishop to admit him to that Order at what time he thinks fit; but regularly there can be no Faculty or Dispensation for entring into Priests Orders before 24, though this is likewise done *Anno currente* as they call it.

As in the Primitive Times, a Deacon was to read the Gospels; so with us his Office consists in reading Divine Service, Catechizing Children, Baptizing Infants, Burying, Marrying; and before the Act of Unitorinity he might be Incumbent on a
Living

Living with Cure, but not since; and the very Form of Ordering Deacons expressly mentions, that 'tis his Office to assist the Priest in the Distribution of the *Holy Communion*; and from hence a Question hath arisen, viz. that since by the Statute 14 Car. 2. those who are not Priests by Episcopal Ordination are prohibited to administer the Sacrament of the Lord's Supper under the Penalty of 100 l. one Moiety to the Queen, the other to be divided between the Poor of the place and the Prosecutor; Whether a Deacon doth not incur that penalty by distributing *Wine* to the Communicants? But I think the bare Act of giving the Cup to them, without consecrating the Wine, doth not make him an Offender within this Law, because the Prohibition is, that no Person shall presume to *Consecrate* and Administer the Sacrament, &c. which Words comprehend the whole Solemnity of the Communion.

Dean and Chapter.

A *Dean* is an Ecclesiastical Magistrate, who is next, in Degree, to the Bishop; he is chief of the *Chapter*, and is called a *Dean*, because he formerly presided over Ten Prebends or Canons; he is by our Law a sole Corporation, that is, he represents a whole Succession, and is capable of taking an Estate as Dean, and of conveying it to his Successors; and therefore, if Lands are given to him, the Inheritance passes without the word *Successors*, because, in Construction of Law, such Bodies never die.

But *Chapters* are not capable to take by Purchase or Gift without the * *Dean*, yet if a Bishop maketh a Lease reserving Rent, and there is a Proviso, that in the vacancy of the *See*, the Rent shall be paid to the *Chapter in jure suo proprio*, this is good, for they are Persons of which the Law take notice, and are capable to receive Rent, though it may be a Question whether in their own right or not.

As to his Original, 'tis thus:

'Tis certain that Ecclesiastical Bodies of Men did anciently reside with the Bishop in his Cathedral, though not under the Denomination of *Dean and Chapter*; and those Men were part of his Family, and when he died they chose another in his room, but they had no peculiar Jurisdiction in the *Saxon* Times.

And so long as the Bishop and his Presbyters lived together, at or near the Mother-Church, he always advised with them in Affairs of Moment relating to the Church; and afterwards, when more Churches were built in the County, and Christianity spread it self there by a fixed and settled Ministry, in those Places where Churches were built, the Bishops had still a Col-

* Moor 52.

lege of Presbyters with them in their Cathedrals, which were their standing Council, and this was the original of Dean and Chapters.

Afterwards, when they got Possessions by the Endowment of Bishops and others, then these Persons assumed Names of Dignity, and obtained peculiar Jurisdictions, and so were called *Prior and Convent*; and when *H. 8.* transferred them to *Dean and Chapter*, the legal Rights which they had remained still, and they became a *Chapter to the Bishop*.

'Tis true, they might surrender their Lands, but they could not dissolve their Corporation; and this appears by the Case of the (a) Dean and Chapter of *Norwich*, who conveyed all their Lands to *Ed. 6.* and he by Letters-Patents incorporated them by the Name of the *Dean and Chapter of Trinity Church in Norwich, ex fundatione Ed. 6.* and regranted their Lands to them, then they made a Lease by their old Name, leaving out those Words *ex fundatione Ed. 6.* and adjudged that the Lease was good, because the Corporation was not dissolved by the conveying all their Lands, for though they had none, they might still exercise Jurisdiction in confirming Leases, &c.

There are now Three, but formerly there were Four sorts of Deans.

1. The first is a Dean, who hath a Chapter, as most Deans of Cathedrals have; but there are some Cathedrals which never had a Dean, as that of *St. David* and *Landaff*, where the Bishop is Head of the Chapter, and in his absence the Archdeacon.

2. There is another Dean without a Chapter, and not subject to the Bishop's Visitation, but hath a peculiar Court, in which he hath Ecclesiastical Jurisdiction; and such is the *Dean of Batel* in *Suffex*, who is presentable by the Lord *Viscount Mountague*, and comes in by Institution of the *Bishop of Chichester*, and by Induction, as other Incumbents.

3. There is another Dean who is not presentable but donative; he hath also a peculiar Court, and Jurisdiction within his Limits; this Dean is constituted by Commission from the Archbishop of *Canterbury*; and such is the *Dean of the Arches*, the *Dean of Bocking*, &c.

4. And there was another called *Decanus Christianitatis*, or a Rural Dean, who had no Judicial Power, but was only a Substitute to the Bishop in granting Administrations and Probates of Wills; but his Office is now devolved on the Archdeacon and on the Chancellor, who generally execute their Authority throughout the whole Diocese.

But because Her present Majesty, by Her Letter to the President of the Convocation dated 29 January 1710. hath signified

(a) 2 And. 167.

that She had transmitted to him the Heads of such Matters which She thought proper for their Consideration; and one was for the establishing *Rural Deans* where they are not, and rendering them more useful where they are; I shall therefore give a short Account of them as they were in former Ages.

When the number of Christians encreased, and when they were formed into Bodies residing in particular Districts or Parishes, the number of the Clergy likewise encreased in order to supply the several Cures in such Places; it therefore was necessary that the Bishops should depute more Officers, besides their Archdeacons, to visit those Presbyters, and People who lived remote from Cathedrals, that they might reform such Things which they should find amiss.

For this reason they appointed some grave and learned Divines, who were placed in the great and most frequented Villages, to visit a certain number of Parishes, which were usually Ten; and the residence and care of these Men being altogether in the Country, they were from thence called *Rural Deans*, and by the *Canonists*, *Arch-Presbyters*.

They were introduced at first into the Church upon the abolishing the *Chorepiscopi*, and were nominated and appointed by the Bishops; but by a Decree of *Innocent III.* not without the Concurrence of the *Archdeacon*, neither could they be removed without his Consent; and yet, after they were vested with the Office, they derived what Power they had from the Bishop, and could do nothing without his particular Order or Commission, which was usually to cite Offenders to the *Spiritual Courts*, to censure infamous Persons, and to punish them either by Penance or Excommunication, and sometimes to collect the Taxes imposed on the Clergy in Convocation.

But now there are very few in *England*, and they are almost useless where they are, being chosen by the Clergy at their Visitations, not to inspect their Lives, but to feast them: 'Tis true, in some Places, they have a License from the Bishop, and are enjoined by Oath to inform against their Brethren, if there should be occasion.

But if there was one in every Deanry appointed to visit that District, and to admonish Offenders, and censure them if they did not amend; and, if that would not do, then to inform their Superiors, that they might be punished according to the Ecclesiastical Laws, the Church might by such discipline receive a great Benefit.

In the next Place, I shall observe who may be made a Dean and who not, and in what manner he is made.

Before the Act of *Uniformity*, *Laymen* were made Deans, as the *Dean of Durham*, but it was not common, and it was for this reason that some Men were of Opinion; that a *Deanry* was not a Spiritual Promotion; but now no Man is capable of that *Dignity* but a Clergyman.

For

For a Dignity it is, because he hath a Jurisdiction, and therefore a Writ brought against him as *Dean* is good without his proper Name; and we have my Lord Coke's Word for it, (b) that a *Deanry* is a *Benefice with Cure of Souls*; and that it had been comprehended under that Name in the Statute 21 H. 8: cap. 13. if it had not been for a special Proviso in that Act, by which 'tis declared that it shall not.

'Tis probable this Proviso was inserted, because at Common Law, if a Man had a Benefice, his Acceptance of a *Deanry* had made his Benefice void; but I am certain that the Authorities cited by my Lord Coke in the Margent of his Third *Institute*, (c) do not warrant it.

For in the Year Book 9 Ed. 3. 22. there was a *Quare Impedit* brought by the King against the *Bishop of Norwich* for disturbing him to Present to the *Deanry of Norwich*, and declares that it was a *Benefice with Cure of Souls*; but that doth not prove it to be so.

Anno 10 Ed. 3. 1. There is the like Declaration, butt no Judgment in either.

Anno 29 Ed. 3. 44. And in the Register 58, there is not a word to this purpose.

Then as to the Patronage of a *Deanry*, (d) if 'tis of *Canterbury* or *Tork*, it formerly belonged of common right to the *Archbishops* to Present upon an Avoidance; but by Composition the *Dean* may be elective by the Chapter.

The ancient *Deans* were elected in the same manner as *Bishops*, viz. by a *conge de eslire* granted to the Chapter to choose; &c. and thus the *Deans of Tork* and *St. Paul's* are elected; but such *Deanries*, which were translated from *Priories and Convents*; and were made Donative after the Statute of Dissolution, &c. are now in the Gift of the Queen, and the *Deans* are installed by Her Letters-Patents without Election or Confirmation; and such are the *Deans of Canterbury, Carlisle, Durham, Ely, Norwich, Rochester, Winchester, and Worcester, &c.*

Our *Lindwood*, and some other *Canonists* give Precedence to the *Archdeacon* throughout the whole Diocess, except within the Verge of the Cathedral, and there he is to give Place to the *Dean*; and I think so he ought in all other Places, because the reason of the *Canonists* in this Case is grounded on a Mistake; for they say a *Dean* hath no Authority but within the Precincts of the Cathedral, which is not true; for if he is next in degree to the *Bishop*, and the Head of the Chapter, as certainly he is, his Authority must necessarily extend throughout the whole Diocess; and 'tis plain it doth, because the Law hath vested him and his Chapter with Spiritual Jurisdiction of the whole *se* *vacante* of the *Bishop*.

(b) 3 Inst. 155. (c) 3 Inst. 155. (d) 2 Rol. Abr. 345.

And as he was next in degree to the Bishop, so, in ancient Times, he and his Chapter were the standing Council to him; not only in disposing the Revenues of the Church, but in Matters of Jurisdiction, which by degrees devolved on the Bishop alone, thro' the Negligence of the *Dean and Chapter*, who would not be at the trouble to attend in such Cases, where there was no Profit to be made, but still continue their old and undoubted Authority in all Things relating to the Endowments of the Church.

Chapter.] The Chapter consists of *Prebends or Canons*, which are some of the chief Men of the Church, and therefore are called *Capita Ecclesie*; these, with the *Dean*, are the Bishop's Council, with whom he may consult in Ecclesiastical Affairs.

They are a Spiritual Corporation aggregate, which they cannot surrender without the leave of the Bishop, because he hath an Interest in them, they may sue and be sued; and if they commence an Action, the Defendant may challenge any Jury-man who is of Kindred to a Prebendary, one of their own Body.

They, with the Dean, are to consent to every Grant made by the Bishop in order to bind his Successors, for the Law did not judge it reasonable to place that Authority in the Bishop alone.

They are Guardians of the Spiritualities during the Vacancy of an Archbishoprick, and they have Power as such, by Virtue of the Statute 25 H. 8. cap. 21. to grant *Dispensations*.

But Anno 24. Car. 2. a Question did arise between the Archbishop of York, and the Dean and Chapter of Durham, who should be Guardian of the Spiritualities *sede vacante* there; the Archbishop claimed it by Prescription, and gave Evidence at a Tryal at Bar, that anciently his Predecessors had exercised Jurisdiction there during the Vacancy; but my Lord Hales was of Opinion, that *de jure Communi* the † Dean and Chapter are Guardians of the Spiritualities, &c. as to Matters of Jurisdiction, and it being proved that the Usage had been such ever since H. 8. the Jury gave a Verdict for the Dean and Chapter.

As a Corporation they have Power to make Leases, but they must take care to name themselves right in such Leases, for otherwise they will be void; as for instance, if they are incorporated by the Name of the (e) Dean and Chapter of the College of St. Mary of Eaton, and they make a Lease by the Name of the Dean and Chapter of the College of Eaton, this is void.

One Bishop may have Two Chapters, as the Bishop of Waterford, who had the Bishoprick and Chapter of Lismore united to that of Waterford in the Reign of H. 3. Now tho' 'tis regularly true, that in such case both Chapters should confirm the Bishop's

† 1 Vent. 225. (e) Morn. 13.

Leases, (f) yet because since the Union they had severally confirmed Leases, such usage makes the Confirmation by one of the Chapters Good.

So where a Parsonage in the Diocese of *Winchester* (g) was annexed to a *Prebend of Salisbury*, and the *Prebendary* made a Lease of it for 99 Years, which was confirmed by the *Bishop, Dean and Chapter of Salisbury*, this was held good without the Confirmation of the *Dean and Chapter of Winton*.

The like case happened between * *Jay and Rider*, Anno 14 Car. 2. viz. a *Prebendary of Salisbury* made a Lease of a Rectory in the Diocese of *Excester*, which was confirmed by the *Bishop of Salisbury*, and the *Dean and Chapter* there, but not by the *Bishop of Exon*, and this Lease was held good, because the Rectory was made Parcel of the *Prebendary of the Church of Salisbury*, by the Grant of H. 2. and the *Bishop of Exon* then being; and tho' the Rector must be inducted by the *Bishop of Exon*, yet he hath his Institution from the *Bishop of Salisbury*, and therefore takes the Oath of Canonical Obedience to him.

Defamation.

THIS is when a Man speaks reproachfully of another, with an intent to take away his Reputation, and 'tis an Offence of which the Spiritual Court hath Jurisdiction to punish the Delinquent in order to reform his Manners.

By the *Civil Law* the Prosecution in such Case was left to the choice of the Person defamed, who might bring an Action against the Offender *pro privato interesse*, and so take some Satisfaction for the Injury done by way of Pecuniary Punishment.

But that Law requires that the Suit should be commenced within a Year after the Words spoken, unless beyond Sea; and if so, then within a Year after his return.

If the Prosecution is not at *Common Law*, but in the Spiritual Court, then the *Libel* is brought *ad vindictam publicam & pro salute animæ*, and not for any Recompence by Damages, for it is to bring the Offender to Disgrace by open Pennance; but even in that case 'tis often commuted for Money, and so the injured Party hath no manner of Recompence, only he hath his Costs *pro expensis litis*.

If would be an endless work to run thro' all the Cases, which are dispersed in our Books, relating to this matter, therefore I shall only say, that, where Defamatory Words are punishable in the Spiritual Court, they must have these Incidents.

The Subject-Matter (b) concerning which the words were spoken must be such which is properly determinable in that

(f) 12 Rep. 71. (g) Cro. Eliz. 587. * Sid. 75. (b) 4 Rep. 20.

Court, as to call a Man Adulterer, Whoremonger, Heretick, Schismatick, &c.

Therefore it must be merely Spiritual and not mixed with any thing that is of Temporal Cognizance, for then the Courts of *Common Law* will prohibit the Ecclesiastical Judges.

After a Sentence in the Spiritual Court (i) in a Cause of Defamation, and Costs taxed, the Party brought an Appeal and then obtained a Pardon; and upon a motion for a Prohibition it was held, that the Pardon was good either before or after the Libel brought, because the Suit was only *pro reformatione morum*, and so it is where 'tis *pro salute animæ*, but the Costs are not pardoned, neither hath such a Pardon any force where the Party hath an interest in the Suit.

Delegates:

THE same Statute, which prohibits Appeals to *Rome*, doth provide, that if Justice should not be done in the Archbishop's Court, it shall be lawful for the Party to Appeal to the Queen in *Chancery*, which before this Statute was usually made to the Pope, and thereupon the Lord Chancellor issues a Commission under the Great Seal directed to an equal number of Civilians and Lawyers, who are to determine all Ecclesiastical Causes upon such Appeals; and because these Commissioners are appointed or delegated by the Queen's Writ, therefore they are called a Court of *Delegates*.

But such Appeals must be from a Sentence given in the Ecclesiastical Court by the Archbishop, or his Official, either;

1. In the Court of the Archbishop;
2. Or in a Peculiar;
3. Or from a Sentence in the Court of Admiralty.

In all these Cases the Lord Chancellor may grant a Commission of Course; but if the Sentence is by Virtue of a general Commission from the Queen, then there lies no Appeal to Her in (u) *Chancery*, but it must be to Her generally, as supreme Head of the Church, and this must be under Her Sign Manual, before the Lord Chancellor can issue out a Commission of Delegates.

And such a Commission is not abated by the Death of the Appellant, for 'tis to proceed in the cause *una cum suis incidentibus vel annexis qualitercunque*, &c. *summariè & juxta juris exigentiam*: So that the Ecclesiastical Law is appointed to be their Rule.

Deprivation:

THIS is where a Man is made incapable of holding a Benefice by some Judicial Sentence in the Spiritual Court

(i) 5 Rep. 51. (u) 2 Roll. Abr. 223. || 2 Lev. 6. 1 Vent. 134.

which must be pronounced by the Bishop himself, and this is expressly required by the (*) Canon. Deprivation may also be by a particular Clause in some Act of Parliament; but in the last Case 'tis provided by the Statute 13 *Eliz. cap. 12.* that no Title to Present by Lapse shall accrew upon any Deprivation *ipso facto*, but after Six Months Notice given by the Ordinary to the Patron.

The Canon allows many causes of Deprivation; but those which are allowed by our Law may be reduced to these Particulars,

1. *Incapacity.*
2. *Contempt.*
3. *Crime.*

Under one of these Particulars all the following Clauses of Deprivation are comprehended.

Adultery. See *Incontinency.* A Parson was deprived for Adultery, and afterwards, by a general Pardon, Adultery was pardoned; this restored him to his Benefice without any Sentence, declaring the Deprivation void, 6 *Rep. 13. Latch. 22.*

Articles of Religion. Not Reading them within Two Months after Induction, and in such case if there should be a general Pardon that will not restore him, but it extends only to Offences, for which an Indictment lies; but this Neglect is not punishable in such a Nature, but with the loss of his Living.

Not Subscribing them upon taking a Second Living makes the First void, without a Declaratory Sentence.

Wilfully maintaining any Doctrine against them, but Notice is necessary to be given to the Patron, otherwise the (y) Bishop cannot collate by Lapse.

Atheism.

Barbary.

Canons. Non-conformity to them.

Common-Prayer. Refusing to use it is (z) Deprivation *ipso facto*; Preaching in Derogation of it; not Reading it within Two Months after Induction, 19 *Car. 2. cap. 4.*

Dilapidation. 'Tis the Opinion of (a) my Lord Coke, that Dilapidation is a good cause of Deprivation, but the Authorities which he hath cited in the Margent of his Book do not prove it; and 'tis probable that his Opinion might induce the Bishop of *Worcester* to tell us that those Authorities did not only shew what the Ecclesiastical Law then was, but that Dilapidations were allowed by the Common Law to be a sufficient cause of Deprivation.

Now, the Cases cited by my Lord Coke are these, viz. 2 *H. 43.* but that was only the Opinion of Serj. *Tyrrwhis*; for the Chief-Justice *Thirning* being of Opinion that if a Bishop or

(*) Can 122. (y) 13 *Eliz. cap. 12.* 6 *Rep. 23.* 1 *And. 136.* *Dyer* 369. (z) 1 *Eliz. cap. 2.* 5 *Rep. Camdrie's Case.* (a) 3 *Inst. 204.*
Arch.

Archdeacon committed waste in cutting the Wood, which they had in Right of the Church, they were not punishable at Common Law; and if so, he demanded of those at the Bar, how they should be punished? And I find Serj. Tyrwhit answered, that they should be deprived.

In 9 Edw. 4. 34. Justice Moile held; that if the Son gave an Abbot 10 l. to pray for the Soul of his Father, and he should spend the Money, yet he should not be deprived, because it was a Gift which he received *in jure proprio*; but if he had aliened any of the Abbey Lands, he might be deprived for those he had *in jure Domus*.

In 29 Edw. 3. fol. 16. There is not a word to the purpose; nor in More 917. which is cited by the Bishop of Worcester fol. 61.

Drunkness, *ad potus aequales*. After Admonition, by the (b) 78th Canon, a Clergy-man is not to go into any Tavern or Alehouse but for his honest Necessities. I find but one instance in our Books of a Clergy-man deprived for Drunkenness, and that was Anno 8 Jac. it was Parker's Case, and he could never get a Prohibition.

Excommunicated. For 40 Days.

Forgery.

Heresy.

Illiterature. Hob. 149. But there must be a declaratory Sentence.

Incontinency. In this (c) case likewise there must be a declaratory Sentence.

Irreligion.

Layman. There must be a Sentence of Deprivation, and Notice to the (d) Patron by the Ordinary.

Mala in se. Guilty thereof, Dyer 293.

Married Priests. This was a cause of Deprivation before the Reformation, and therefore one was deprived in the Reign of Queen Mary, but restored 1 Eliz. by Virtue whereof he was Incumbent without any new Presentation; but in those Days a Priest might keep as many Concubines as he would.

Manslaughtier. Convicted thereof in the (e) Temporal Courts; for the Ecclesiastical hath no Jurisdiction in Capital Cases, and therefore the Sentence of Deprivation is grounded upon the Conviction in the Courts at Law.

Murder.

Nonage. Under 23 the Patron must have Notice, Marsh 119.

Ordinary. Disobedience to him, 2 Cro. 37.

Perjury. Convicted thereof.

(b) 1 Brownl. 70. 2 Brownl. 37. (c) Hob. 293. Cro. Eli. 41. 789.
(d) Dyer 293. 1 And. 16. 5. Rep. 102. (e) 2 Cro. 430. Hob.
121. 288. Keil. 181.

Plurality. 'Tis void *ipso facto*, by the Statute 21 H. 8. (f) and therefore no need of a declaratory Sentence, but the Patron is to take Notice of such Avoidance.

Sacraments. Not administering in the form prescribed.

Scandal.

Schism.

Surplice. Not wearing it.

Symony. This was a cause of Deprivation before the Statute 31 Eliz. cap. 6.

Tenhs. Demanded at the Churches or Houses of Clergymen by the (g) Collector, and not paid then or within 40 Days after, and the Bishop certifying this Default in the Exchequer.

It hath been a Question whether the Bishop's Certificate is Peremptory in this (h) Case, and adjudged that 'tis not, but that it may be traversed, because he certifies as an Officer, and not as a Judge.

Then there are some Niceties in the Demand, and the Certificate, *viz.* That it must be made by a proper Officer, having Authority from the Bishop, and not by an Apparator; neither can such Officer appoint them to be paid to a Deputy, or at any other place but the House of the Clergyman, and they must be demanded in the Name of the Bishop, and he must not certify the *non* Payment only, but the place of Demand; and all this must be after the 40 Days are expired, for if he certifie before that Time 'tis void, *Savile* 1. 26.

But in most of these Cases, if the Party Appeal to a Superior Court, the Sentence by that means is suspended, and if 'tis reversed upon hearing the Appeal, the Clerk continues Incumbent without any new Institution.

Yet if the Deprivation is for a Thing meerly of Ecclesiastical Cognizance, in such case no Appeal lies, and the Party hath no Remedy but by a Commission of Review, which is granted by the Queen of meer Grace, *Moor* 781.

In the next Place there is a Difference to be observed where a Benefice is only voidable, but not actually void before a declaratory Sentence of Deprivation, and where 'tis made void *ipso facto* by some Statute; for in the first case the Party must be cited to appear, there must be a Libel against him, and a Time assigned both for the Proof and Answer to it, and liberty for Advocates to Plead and except against the Proof, and after all a solemn Sentence upon hearing the Allegations on each side, which by Virtue of the (i) Canon must be pronounced by the Bishop himself, with the Assistance of his Chancellor or Dean, and some of the Prebendaries, or of the Archdeacon and Two other grave Ministers.

(f) Cro. Car. 357. (g) 26 Hen. 8. cap. 3. (h) Cro. Eliz. 80. (i) Canon 122.

But none of these Formalities are required where the Living is made *ipso facto* void ; 'tis true, in that (k) Case the Ordinary must give the Patron personal Notice of such Depriuation, before he can have a Title to Present by Lapse, because 'tis penal both to the Incumbent and Patron, and 'tis not sufficient to give Notice in the Church, or to fix it on the Doors thereof, but it ought to be *verè propriè & personaliter & non fide* ; and if there should be any difficulty in finding out the Person who hath the next Presentation (as it may happen) or the Patron who hath the Inheritance of the Advowson, the Bishop in such Case may award a *jus Patronatus*, and so give him Notice who is found by Verdict to have the Right, if he can be found in that County where the (l) Church is, if not, then publick Notice is to be fixed on the Church-door ; but this doth not bind the Right of the (m) true Patron, if he that is found by the Verdict on the *jus Patronatus* should not be the Parson.

It hath been lately questioned whether the Archbishop hath a Power to deprive a Bishop for any just Cause, or whether it ought to be done in *Convocation*.

Those, who deny the Archbishop's Power in this Case, do affirm that he hath no such Authority, either by the Canon, or the Statute Law.

That the *Canons* are expressly against it; for those direct that a Bishop shall be deprived in a Synod of the Province, or if that cannot be assembled, then by the Archbishop and 12 Bishops at least, not as Assistants, but as Judges.

Some Instances may be given of this Method of Proceeding, as early as the *Third Century*, in the Case of *Fortunatus*, whom some Schismatics of *Carthage* had set up for Bishop of that Place in Opposition to *St. Cyprian*, who did not think fit to depose him by his single Authority, but had it done in a full Council of the *African Bishops*.

So likewise *Basilides* and *Martialis* were deposed in that Age by another Council of *Spanish Bishops* ; and many more such Instances may be found in the Fathers, and all this was in Conformity to the ancient *Canons* of the Church.

I shall not enquire whether these *Canons* were ever received in England, but the Practice hath been against them ; for Bishop Bonner was deprived of his Bishoprick by *Commissioners* appointed by the King :

I know 'tis said that such *Commissioners* were issued at that Time from the *Crown*, by Virtue of a Supremacy lodged in our Kings, because a Bishop could not be deprived in a Synod so soon after the Reformation ; for the Popish Bishops and Clergy were then too numerous in those Assemblies for the Protestants, and therefore they proceeded by such *Commissions*.

(k) Dyer 346. Cro. Eliz 680. (l) Dyer 328. Cro. Eliz. 119
(m) Hob. 318.

But it was not an Objection against *Bonner's* Deprivation, that it was Uncanonical, as being done by the King's Authority, but because some of the *Commissioners* were Laymen, and what if they were? The Sentence shall not be therefore void, for not 'tis wholly an Ecclesiastical Censure, so that none but *Church-men* must be concerned in it, for 'tis of a mixt Nature that a Layman may also joyn in such a Censure.

Besides, since a Bishop is vested with that Dignity by a *Commission* from the King, 'tis reasonable that he should be deprived (where there is just Cause) by the same Authority, for though the Pope did formerly assume a Jurisdiction to deprive Bishops, it was by Usurpation; and what Power he had before the Reformation, the Kings of *England* have enjoyed, since they have been restored to their ancient Right;

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| And therefore not only <i>Bonner</i> , but | { <i>Gardner</i> , <i>Heath</i> , <i>Day</i> , <i>Tunstall</i> , <i>Vescey</i> , | { were depriv'd of their Bi- shopricks of | { <i>Winton</i> , <i>Worcester</i> , <i>Chester</i> , <i>Durham</i> , <i>Exon</i> , |
|---|---|---|--|

By Commissioners appointed by the King: 'Tis true, all those Sentences of Deprivation were afterwards repealed by Queen *Mary*, but it was not for being Uncanonical, as done by the legal Authority; for that Queen made use of the like Power to repeal them. The Objections were, that the Commissioners proceeded *ex officio* contrary to the King's Ecclesiastical Laws, that *Interrogatories* were administred to Witnesses who were meer Strangers to the Bishops, and examined privately, and not on Oath; and that the Commissioners would not suffer them to cross Examine those Witnesses, nor receive any Appeal, but deprived them *pendente appellatione*

Dilapidations.

TIS not only the Interest of the Church in general to preserve what belongs to it, for the Benefit of the Successors; but 'tis a part of common Justice and Honesty that it should be so; and therefore the Old Canons, and particularly that of Cardinal *Ostobon*, *de Domibus Ecclesiarum reficiendis*, * and our own Provincial Constitutions require the Clergy sufficiently to repair the Houses belonging to their Benefices, which if they neglect or refuse to do, for the space of Two Months after Monition, then the Bishop may cause it to be done out of the Profits of the Benefice; and by the Injunctions of *Edw. 6. Anno 1547.* and of Queen *Elizabeth* 12 Years afterwards, the Clergy are required to set apart the Fifth of their Revenue to repair their Houses, and to keep them in Repair.

* Fol. 55. 2.

The Canon Law having so well provided for the Reparation of Houses belonging to the Church, the next Thing to be considered is, what shall be accounted Dilapidations.

And as to that, by the same Law, not only the decay of the (n) Buildings, but wasting the Woods, or any Ecclesiastical Revenues, or cutting down Timber, are held to be Dilapidations.

But 'tis not so at Common Law, for the Church is a Building; yet if 'tis in Decay, this is not any Dilapidation so as to charge the Incumbent, because by the general Custom of *England* the Body of the Church is to be repaired by the Owners of Houses and Lands, in the Parish, unless where a contrary Custom prevails.

Now the Waste for which a Parson is to be prohibited should be such which goes to the Destruction of the Estate, or Revenues which belong to the Church; and therefore if a (o) Clergyman should digg Mine in his Glebe, this hath been held to be no Waste.

As to Trees, Woods, &c. belonging to the Church care is to be taken to preserve them; for if they are felled for any other (p) use but for necessary Repairs, or for Fuel to be spent in the Mansion House, the Court will grant a Prohibition.

So if a Vicar cut down Trees in the Churchyard, a Prohibition lies to stay Waste, and the (q) Churchwardens may hinder him from carrying them away; this is accounted a Dilapidation, and by the Opinion of my Lord Coke 'tis a sufficient Cause of Deprivation.

By the Canon Law also, Dilapidations are made a Debt which is to be satisfied out of the Profits of the Church; but if the Incumbent should imploy those Profits for his private Benefit, then 'tis to be satisfied out of his Personal Estate.

But the Common Law prefers Payment of Debts due upon Contract, &c. before this Debt for Dilapidations; but not the Payment of Legacies.

The Prosecution for this Offence may be brought either against the Incumbent himself, or against his Executor or Administrator; and it was brought by Bishop *Bancroft* against the Son and Heir of his Predecessor, Bishop *Aylmer*; against whom he obtained a Sentence in the Arches for 4210 l. for Dilapidations in the Palace and Cathedral of his Bishoprick; and because the Son had not a Personal Estate from his Father sufficient to satisfy the Damages, the Lord Treasurer *Burleigh* was desired to exhibit a Bill in Parliament for the Sale of so much of Bishop *Aylmer's* Estate as might discharge the same.

'Tis true, such a Bill is very equitable, especially when the Lands, which descend to the Son, were purchased with that Money, which should have been laid out in repairing the Church;

(n) 2 Bulst. 279. (o) Sid. 152. (p) 2 Bulst. 279. (q) 3 Bulst. 158. 1 Roll. Rep. 335.

and therefore the Heir compounded with Bishop *Bancroft*, for a good Sum of Money to prevent the making a Law to enforce him to pay the whole.

The Prosecution likewise against the Incumbent is proper in the Spiritual Court, and the Remedy is easy, for the Bishops may Sequester the Profits of the Benefice to Repair the Buildings, &c.

If 'tis brought against the Executor it may be likewise in the Spiritual Court; but the Successor may have a Special Action on the Case, upon the common Custom of England.

Quod omnes (r) Præbendarii, Rectorēs, & Vicarii Regni Angliæ, pro tempore Existentes, omnes & singulas domus & ædificia Præbendarum, Rectoriarum & Vicariarum suarum reparare & sustentare, & ea reparata & sustentata successoribus suis dimittere teneantur, &c.

Upon this Custom several (s) Actions have been brought, and Damages recovered, which must be laid out within * Two Years afterwards upon the Reparations, or the Party forfeits double the Value to the Queen of so much as shall be received, and not so employ'd.

But it hath lately been questioned whether such Actions will lay, it was *Pas 2 Willⁱ in C. B. between Jones and Hill*, the Chief Justice *Pollexfen* being of Opinion, that the Suit for Dilapidations must be only in the Spiritual Court; and therefore caused the *Rolls* of those Cases mentioned by Sir *Simon Degg* to be searched, but found no Judgments entered, so those Cases could be of no Authority to prove that the Action might be brought in the Temporal Courts, but *Mich³ Jac² in C. B. Rot³ 332. inter Day and Hollington*, there was a Judgment entered for the Plaintiff upon the Defendant's Demurrer to a Declaration for Dilapidations; and therefore in *Jones's Case*, he, having a Verdict, had afterwards a Judgment, but there were only 2 Judges in Court. The like Action was brought about 3 Years afterwards in *B. R.* and the Defendant pleaded a Tender of 10 *l.* which he alledged to be sufficient, and so it was found at a Tryal, but not thinking it enough, he began another Suit in the Ecclesiastical Court for the same Thing, to which the Defendant pleaded in Bar the Judgment obtained in *B. R.* and held good.

Now lest such a Recovery should be made ineffectual by any secret Conveyance of the Personal Estate of the (r) Incumbent, the Law hath provided that if any Clergyman makes such a Gift of his Goods to defraud his Successor, he shall have the same Remedy in the Spiritual Court against the Person to whom such Conveyance was made, as he might have against the Executors of the deceased Parson.

'Tis to be observed, that the Person, to whom such Gift or Alienation shall be made, shall make no farther Recompence

(r) *Hern.* 136.
(s) 13 *Eliz.* cap. 13.

(s) *Parl. Counc.* 80.

* 14 *Eliz.* cap. 11.
than

than for the Dilapidations or Decays which have happened by the Fault or Default of the Incumbent: Therefore, when a Parson is inducted, and finds the Buildings in Decay, and that his Predecessor did not leave a sufficient Personal Estate to repair them; he may have the Defects surveyed by Workmen, and attested under their Hands in the Presence of Two or more credible Witnesses, which may be a Means to secure him from that Charge which might ensue, for the Fault or Neglect of his Predecessor.

Dispensation. See Plurality, Commendam,

THIS is a Term used amongst the Canonists, and it signifies a Particular Privilege granted to a Person either to have or do that which by the Canon Law he was prohibited to do, &c.

The first Dispensations were only Relaxations of that Penance, which Persons were to undergo who had transgressed against the ancient Canons of the Church, but not a total Release of the Force of those Canons, so that they should be no longer binding upon the Consciences of Men.

But afterwards the Canonists made it to be a *License* for a Man to do that which he could not lawfully do without it, with a *Non obstante* to the Canon it self; and the Bishops did usually dispense with those Canons which concerned Discipline, upon Pretence that the Interest of the Church might be advanced by it, and by this Means the Severity of the Primitive Discipline was laid aside.

This made the Bishops of *Rome*, who were generally ambitious of Reputation, to stand up for the Ancient Canons; and they prosecuted the Matter with so much Zeal, that they were esteemed to be the Guardians of those Canons, till at last they assumed a Power over them, and then this Doctrine was started, that the Authority of dispensing with them was a Peculiar Privilege vested in the Bishop of *Rome*, and that no Inferior Bishop had any Manner of Power to dispense.

For the Canonists say, that *Papa in omnibus pure positivis, & in quibusdam ad Jus Divinum pertinentibus, dispensare potest, quia dicitur omnia Jura habere in scrinio Pectoris sui, quantum ad Interpretationem & Dispensationem.*

Afterwards, by the Permission of this very State, and by open and solemn Decisions in our Courts of Justice, made in Favour of the Pope's Dispensing Power, the Ecclesiastical Laws were almost made useless; and this was the Occasion why the Parliament, Anno 21 H. 8. cap. 13. thought fit to restrain and limit that Power, and they began in Cases of Pluralities; for by the Canons of the Church no Man was to take more than One Benefice with Cure of Souls, because the same Person could not reside in Two Places at the same Time.

But

But the Pope, to encrease his Revenue, did dispense with Men to take Pluralities without Number or Value, and therefore by that Statute the Acceptance of a second Benefice with Cure of Souls, where the first was of the yearly Value of 8 *l.* was made void, and that any Dispensation to the contrary should not only be void, but the Party procuring the same should forfeit 20 *l.* to be divided between the Queen and Prosecutor.

About Four Years afterwards the (a) Parliament taking Notice that the Nation was made Poor by Exactions of the Bishop of Rome, and that he raised great Sums of Money by *Dispensations*, they prohibited all Persons to sue for them from Rome in any Cases whatsoever; and therefore they vested the Archbishop of Canterbury with a Power to grant the same in Things formerly used to be dispenced withal, but not otherwise, without the Approbation of the King and his Council.

My Lord Hobert (b) tells us, that the Meaning of those Words must be, that the Archbishop might Dispense in all such Spiritual Matters, which the Pope formerly did, *Quasi de jure*, but not in every Thing which he did generally, for he granted *Dispensations* against the Law of God, viz. to Mary within the Prohibited Degrees, and likewise against the Laws of this Kingdom; as for an Alien, who neither spoke or understood *English*, to have a Benefice here with Cure of Souls, tho' he never resided upon it; and 'tis not sufficient to say, that such a Place may be supplied by a Curate, because the Grant must be first legally fix'd in the Grantee, before it shall go in Deputation to another.

But tho' the Pope did assume this Transcendent Authority, yet I find a Power was lodg'd in the Kings of *England* long before H. 8. to grant Dispensations in Ecclesiastical Causes, as in Cases of Appropriations, Commendams, Exemptions, Pluralities, &c.

To instance in some more particularly, viz. By the Canon Law every Spiritual Person is visitable by his Diocesan; but William, call'd the Conqueror, exempted the Dean of *Battel* in *Suffex* from Episcopal Visitation, and so it continues at this very Day.

And even at that Time, when the Pope was (as my Lord Hobert calls him) *Damon Meridianus*, and his Authority very great in this Kingdom, the Crown kept Possession of that just Power of Dispensing *In Spiritualibus*, as to retain a Benefice with a Bishoprick to hold Two Livings, &c.

'Tis true, it was the Opinion of some (c) Parliaments in that King's Reign, that the Bishop of Rome had deceived the People of *England*, by persuading them, that he had an absolute Power to dispense with Human Laws in all Spiritual Ca-

(a) 25 H. 8. cap. 21. (b) Hob. 147. (c) 28 H. 8. cap. 16.

ses; that it was an Usurpation which derogated from the Imperial Crown, because the King had no Superior here, and that the People were not bound to observe the Laws of any Foreign Prince or Prelate, but only the ancient and accustomed Laws of this Realm; and that therefore it was both just and reasonable that the King and Parliament might dispense with such Laws, and accordingly they did dispense with the same.

For, tho' some of those, which we call Ecclesiastical Laws, were at first made by a Foreign Prelate, yet, being established here by a long and continual Usage, they are now become the Laws of the Land, and not to be dispensed withal by that Power by which they were originally made, but by the Queen herself. (d)

And as she may dispense with those Laws, so she may pardon all Suits in the Ecclesiastical Courts, which are *Pro reformatione Morum*, or *Pro salute Animæ*.

Divorce.

THIS is a Separation of a married Man and Woman by the Sentence of an Ecclesiastical Judge, qualified to pronounce the same.

Tho' the Sentence is now given by such a Judge, yet originally the Church had no Power to Divorce for incestuous Marriages, and so to bastardize the Issue; for these were Acts to be done by the Civil Powers, and by the Coercion of such Laws, to which the Parties were locally subject; the Church had only Power to prohibit such Persons from receiving the Communion with the rest of the Christians.

But notwithstanding the Spiritual Court hath now a Jurisdiction in this Case, yet the Judge is restrained in this Part of his Judicature by several Canons; as for Instance,

1. (e) He shall not give Judgment upon the Confession of the Parties alone, without any other Proof.

2. (f) The Sentence must be pronounced in open Court in the Seat of Justice, but not without the Knowledge of the Archbishop, Bishop of the Diocese, or Dean of the Arches.

3. (g) And that in all Sentences of Divorce, *A Mensa & Thoro*, the Parties give Bond not to marry during each others Life.

(h) The Judge offending in the Premises shall be suspended from his Office for a Year, and the Sentence of Divorce shall be void.

By the Laws of the first King of the Romans a Man could not divorce his Wife, but either for Adultery, for endeavour-

(d) 5 Rep. 51. (e) Canon 105. (f) Canon 106. (g) Canon 107. (h) Canon 108.

ring

ing to Poison him, for false Keys, or for drinking Wine, which was a Crime as Capital as Adultery; and therefore Relations were obliged to kiss Women, to find whether they did smell of Wine; and 'tis probable this might be the first Occasion of such Salutations, which are continu'd to this very Time.

But there are several Causes of Divorce, of which our Law takes Notice.

1. *Pracontract.*

2. *Consanguinity, Affinity, Impuberty.*

3. *Frigidity.*

And these are *A vinculo Matrimonii.*

4. *Adultery, Fornication, propter Severitiam.*

And these are only *A Mensa & Thoro.*

In all those Cases where the Divorce is *A vinculo Matrimonii*, the Marriage was not *De jure*, because it was void *Ab initio*; for where the Incapacity arises by reason of any Matter precedent to the Marriage, there 'tis only *De facto*, and the Sentence of Divorce in such Case is only Declaratory; that the Marriage is dissolved, for it was absolutely void before; (i) and either of the Parties might marry again, tho' the other was living.

But 'tis otherwise where the Divorce is occasion'd *Ex Causâ Subsequentii*, as in Cases of Adultery, Fornication, &c. for there the Marriage, being once good, or, as my Lord Coke (k) calls it *Iusta Nuptia*, can never be dissolved, because such subsequent Cause cannot affect the Bond of Marriage, tho' 'tis sufficient to separate the Parties *A Mensa & Thoro*, which is in the Nature of a Temporal, but not a Perpetual Divorce; and if either of the Parties marry again, the other being living, such Marriage is void, and so it was adjudged in the Case of Rye and Fulcomb. (l)

And as a farther Confirmation of the Law in this Matter, it was adjudged about Two Years afterwards that a Divorce (m) *Causa Adulterii* is no Bar of Dower, which shews that the Marriage is not dissolved.

But tho' it still continues, yet such a Divorce *A Mensa & Thoro* doth protect each Party from being a Felon, tho' they marry again, the other being living; for Polygamy was not Felony till made so by the Statute *Anno 1 Jac. cap. 11.* in which there is a Proviso, that it shall not extend to Persons legally divorced.

'Tis true the Court, *Anno 12 Car. Cro. 461.* doubted of this Matter in *Forest's Case*, where the Divorce was *Propter Severitiam* of the Husband, and the Woman married again, her first Husband being then alive; but no Reason was given for this doubt, only that many Inconveniencies might ensue Divorces

(i) Cro. Eliz. 857, 858. (k) 3 Inst. 89. (l) Noy 100. Moor. (m) Noy 108. Godb. 145.

upon such a Pretence, and therefore they advised the Woman to get a Pardon, tho' the Divorce in this Case is grounded upon Natural Right, and like a Divorce ; for Adultery is never to be allowed upon the Confession of the Parties, but upon plain Proof.

Precontract.] I shall now treat of the several Causes of Divorce before-mentioned, and first of Precontract.

This makes a nullity of the Marriage *ab initio* ; but if a Man marrieth a Woman, who is (*n*) precontracted to another, and hath Children by her, they are his Children till the Divorce, and then they are Bastards.

A Precontract is called a Marriage *per verba de presenti tempore* ; now if after such a contract the (*o*) Woman marrieth another, the Man, with whom she contracted, may compel her by a Sentence in the Spiritual Court to marry him, without making the other Man, whom she actually married, a Party to the Suit, and without any Sentence of Divorce as to that Marriage, and if they marry after such Sentence, their Children shall be Legitimate, and this was *Buning's* Case.

But it was a very odd Opinion of Serjeant *Windham*, who held, that if a Man and Woman were contracted, and afterwards the Man married another, and then the Woman, with whom he first contracted, obtained a Sentence in the Spiritual Court, declaring the Marriage to be void, and that he and the Woman with whom he first contracted were Man and Wife, that in such Case they were Man and Wife without any farther Solemnity ; and this he tells us was the Opinion of Mr. *Noy*; but Justice *Twissden* was of another Opinion, that such Sentence did not make a Marriage. *Sid.* 13.

Consanguinity and Affinity.] I shall in the next Place treat of *Consanguinity* and *Affinity* in the prohibited Degrees; one of which is a Relation arising out of nearness of Blood, the other out of Marriage.

Cajetan was of Opinion, that the Laws concerning Marriage in *Leviticus* did not bind the *Christian Church*, because they were only positive Precepts given to the *Jews*, and therefore were binding to them only, and not to Christians.

But this seems to be a mistaken Opinion, for Marriage was instituted in a pure State of Innocence, though it was afterwards corrupted by the incestuous Concoctions of Kindred in the very nearest Degrees, which was dispensed withal in those early Days, till the World was competently peopled ; for at first the Marriage of a *Brother with a Sister of the whole Blood* was not thought unnatural but necessary ; it was enjoined by the positive Command of God, which was to encrease and multiply ; and if *Adam's* Sons had not gone into their Sisters, I cannot see how the World had been encreased ; so that

(*n*) 2 Inst. 93. (*o*) Moor 109. 4 Rep. 29.

Brothers marrying their own Sisters seems to be *contra* with Mankind.

After the Flood many Marriages, which were afterward prohibited by *Moses*, were not only lawful, but rewarded with particular Blessings, as that of *Abraham* with *Sarah*, who was his *half Sister by the Mother's side*, which was expressly prohibited in *Leviticus* (p), viz. *Thou shalt not discover the shame of thy Sister the Daughter of thy Father.*

And even *Moses* himself was born of an incestuous Marriage between *Amram* and *Jochbed* (q), who was his *Father's Sister*, which is within the *Levitical* Degrees (r).

But that primitive Blessing which was originally given by God himself to *Adam* in Paradise, that he should be Fruitful and Multiply, and replenish the Earth, was restrained by *Moses* after the World was peopled, by laying down Rules and Prohibitions concerning the Degrees of Kindred and Affinity, which he formerly and particularly gave to the Man; but none to the Woman, yet the Reason of one extends to the other.

Now 'tis to be observed, that the Prohibition was given to the Man, because in the Act of uncovering the Nakedness, &c. he is properly the first Agent, and the Woman is only consenting to it, for 'tis as impossible that she should uncover his Nakedness as 'tis for her to ravish him.

Some of those Rules are moral Precepts and declarative of the Law of Nature it self, and by consequence were not only obliging to the *Jews*, but to all Christian People; as for instance, in the descending Line a Man is prohibited to marry his *Daughter* or *Grandaughter*, and as to nearness of Blood in that Line, the Prohibition goes no farther, but morally it extends to all others descended from him, though never so remote, and the Reason is given by the learned *Grotius*, (s) because, though the Wife is subordinate to the Husband by the Laws of Marriage, yet that allows so great a Familiarity between them as is not consistent with a Duty of a Child to a Parent; for in the ascending Line the Prohibition goes no farther than the Marriage with one's Mother in express Terms, but all Degrees upwards in that Line are equally prohibited, though not expressed, so that there can be no lawful Marriage either in the descending or ascending Line of Generation.

Now the rest of the *Levitical* Prohibitions in cases of Marriage seem to be warranted by God himself; (t) for when a certain Sect of the unbelieving *Pharisees* were of Opinion, that they ought to keep the Law of *Moses*, and some of them who came from *Judea* had taught the Gentiles that they could not otherwise be saved, when these Men could not be convinced

(p) Lev. 18. ver. 9. (q) 6 Exod. 20. (r) 18 Lev. 12. (s) De jure belli, Lib. 2. cap. 5. (t) Acts 15.

to the contrary by the Arguments of St. Paul and Barnabas, they went together to Jerusalem, where a great Council of the Apostles and Elders were assembled to determine this Matter; and Peter, who was their Speaker, told the People that these Men tempted God by their Opinions to put a Yoke upon the Necks of the Disciples, which neither they nor their Fathers were able to bear; the Result of this Council was (as it appears by the Letter which they sent to Antioch) that it seemed good to the Holy Ghost, and to them to lay upon the Gentiles no greater Burthen then those Four necessary Things;

1. To abstain from Meats offered to Idols.
2. From Blood.
3. From Things strangled.
4. And from πορνεία, which our Translation hath rendered Fornication, but in the Septuagint it signifies any unlawful or incestuous Copulation.

It could not be simple Fornication, because, by the very Law of Moses, that was satisfied by the Marriage of the Man with the Woman, and frequently by a pecuniary Compensation.

So where St. Paul in his Epistle to his Corinthians (u) Condemns the Marriage with his Father's Wife, because it was a Fornication not so much as named amongst the Gentiles, this could not be intended of a simple Fornication, but of any incestuous Marriage.

Another of those Prohibitions is, that a Man shall not discover the Nakedness of his Brother's Wife.

'Tis to be observed, that before this Prohibition, it was not only lawful, but a Man ought to marry his Brother's Wife if he died without Issue, and the raising up Seed to him was called the doing the Office of a Kinsman, as in the Case of Onan (x) before the Law.

After the Law this was so well known amongst the Evangelists, that when the Sadducees (y) who denied the Resurrection, told our Saviour that Moses said, if a Man died without Children, his Brother should marry his Widow, and raise up Seed to his dead Brother; and having likewise told him, that one amongst them had married Seven Brothers successively, and asked him whose Wife she should be at the Resurrection? Our Saviour did not condemn the Custom, or take notice that the Marriage was unlawful, but answered the Question plainly, viz. That at the Resurrection there was no marrying, &c.

But though this Law was not binding to the Jews, unless the dead Brother had no Issue; yet 'tis obligatory to us Christians in the strict Sense and Acceptance of the Words; for St. John Baptist told Herod, Matt. 14. 4. it was unlawful for him to marry his Brother's Wife.

(u) 1 Cor. 5. 1. (x) 38 Gen. 8. 25 Deut. 5. (y) 22 Mat. 22. 23. There

There is another degree of Affinity which resembles this, and 'tis where a Man Marries *his Wife's Sister*, this is likewise within the *Levitical Degrees*.

But some Arguments have been invented to prove that the Reason is not the same in these Cases, for the Text shews upon what account One Brother shall not marry the Widow of his deceased Brother, *viz.* because he should not discover the Nakedness of his Brother's Wife.

Now that can be no reason against a Man's marrying his Wife's Sister, because it must be presumed, that he hath uncovered his first Wife's Nakedness before he married her Sister.

The Scripture which concerns this Case is in these Words, *viz.* (a) *Thou shalt not take a Wife to her Sister to vex her to uncover her nakedness, besides the other, in her Life-time*, which implies that it may be done after One Sister is dead, for then she cannot be vexed.

It was the Opinion of *Grotius* (b) that those Words ought not to be understood as an indefinite Prohibition that one Man should not marry Two Sisters, but that he should not have them at the same Time; and he tells us, that by an Apostolical Canon (c) such Marriages were not condemned as Sinful, but Inconvenient, and the Punishment was that the Person so marrying could not be admitted into the Order of a Priest.

Cunæus * tells us, that such Marriages were forbidden to the Jews, for no other reason, but because Two Sisters never lived quietly under One Husband, as other Women did, who were not so nearly related.

But some are of Opinion that the said Canon cannot be understood of having Two Sisters at the same Time, for that was never permitted amongst Christians, therefore it must be intended of marrying One Sister after the Death of another; and if that was lawful when that Canon was made, why was there any Punishment inflicted for doing a lawful Act? If it was unlawful at that Time, how came it to be lawful since?

A Degree a little more remote, is the (d) *marrying the Wives Sisters Daughter*; there was a Libel in the Spiritual Court against the Parties thus married, and they proceed there to Excommunication, but a Prohibition was granted, and the Defendant demurred upon it, but it doth not appear what became of it by some of the Reports of that Case; but *Jones* says, a Consultation was granted; and my Lord *Vaughan* (e) tells us, that in the very like Case a Prohibition was denied, though this Marriage is not expressly within the *Levitical Degrees*, but because Marriages more remote are forbidden, the High-Com-

(a) Lev. 18. 18. (b) De jure belli, lib. 2. cap. 5. part 14.

(c) Canon 18. * *Cunæus* de Repub. Hebr. lib. 2 cap. 23.

(d) Sid. 434. Raim. 464. 2 Lev. 254, Jones 118. 3 Lev. 364. (e) Vaugh. 206. 2 Vent. 9.

missioners gave Sentence of Divorce (f) in such Case, and upon a Motion for a Prohibition upon the Statute 32 H. 8. it was denied, because the Court never Prohibits in Cases of Marriage, but where they are out of the *Levitical* Degrees; and this was *Man's* Case. 'Tis true, Serj. *Moor* hath reported the same Case to the contrary, viz. That a Prohibition was granted because it was a Marriage not prohibited, but this might be upon the first debate of the Case; for my Lord *Vaughan* tells us, that at first Prohibitions were granted upon the (g) Statute, in Cases which were not specifically mentioned in the 18th of *Leviticus*, but that upon Consideration of the Degrees therein prohibited, Consultations were afterwards granted, because some Marriages must be prohibited which are not nominally expressed in that Chapter, as the Marriage of the Father with his own Daughter.

But there is a late Authority in Print as to this Matter, viz. † where a Man married his first Wife's Sister's Daughter, it was said, this was expressly against the * Canon, which Prohibits all Marriages within the *Levitical* Degrees, and expressed in a Table set forth by Authority, Anno 1563.

So where a Man married his Sisters Daughter, this is within the *Levitical* Degrees; and this was (b) Sir *Giles Allington's* Case, but *Hunsley* tells us, it was the Daughter of his Half Sister, by the Father's side, and that he was fined 10000 l. committed, excommunicated and divorced.

Anno 8 Will' one *Haynes*, having married his own Sister's Bastard, was prosecuted in the Spiritual Court for Incest, and the Court of King's Bench was moved for a Prohibition, upon the Authority of my Lord *Coke*, who tells us one || *Parsons* married the Daughter of his first Wife's Sister, and it was adjudged a good Marriage, and not prohibited by the *Levitical* Degrees.

Another Reason was given, because a Bastard Daughter is no Daughter, according to that Rule in Law, *Qui ex damnato coitu nascuntur inter liberos non computantur*. As to *Parsons* Case, which my Lord *Coke* mistakes for one *Richard Parson's* Case, a Prohibition was granted; because it did not appear in the Libel, that the Marriage was against the Law of God; but my Lord Chief-Justice *Vaughan*, who had seen the Record, tells us that a Consultation was afterwards granted; because the Plaintiff in the Prohibition had not suggested, that the Marriage was out of the *Levitical* Degrees; he only says it was *extra leges Leviticales*, †† which is as if he had said they were not under the *Jewish* Commonwealth, when he should have averred the Marriage to be *extra gradus Leviticales*.

However that was a Marriage of his Wife's Sister's Daughter, but this was for marrying his own Sister's Daughter; and a

(f) Cro. Eliz. 228. Moor 907. (g) 32 Hen. 8. † 2 Lut. 1077.
* Can. 99. (b) Vaugh. 323. || 1 Inst. 235 †† Vaugh. 248.

Daughter she is so as to make the Marriage incestuous, tho' being a *Bastard*, she is not a *Daughter*, so as to take an Estate of Inheritance by descent from her Ancestor.

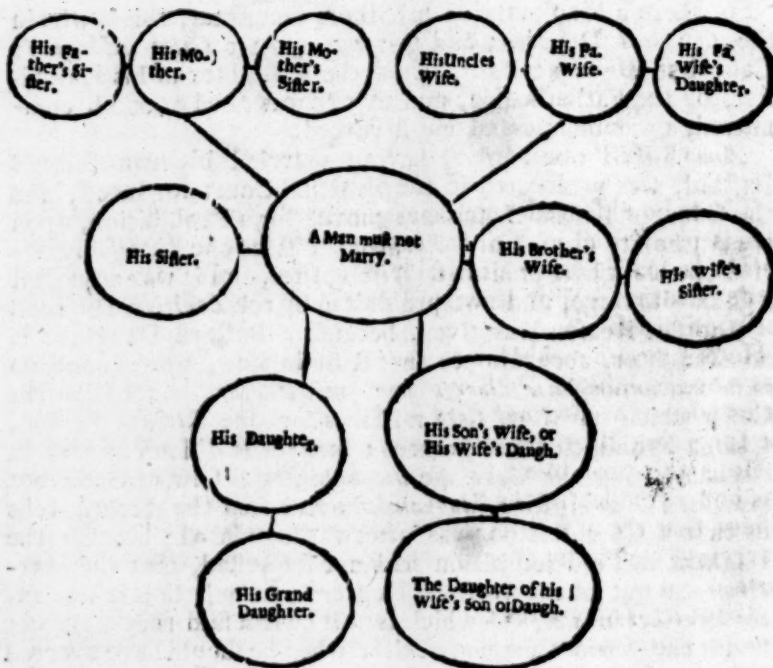
A Man married his great Aunt, being the (i) Widow of his Grandfather's Brother, by the Mother's side, and this was not held incestuous; but marrying with an Aunt is prohibited, because 'tis a Contradiction that she should be inferior to her Husband in point of Marriage, and superior to him in point of Parentage.

The reason is not the same where the (k) Uncle married the the Niece, because he is superior in both respects, but yet in such case a Consultation was granted.

But now by the Statute 52 Hen. 8. cap. 38. all Marriages are declared to be lawful between Persons who are not prohibited by God's Law to Marry, and that no Reservation or Prohibition (God's Law excepted) shall impeach any Marriage within the *Levitical* Degrees, which are as follows;

In Consanguinity.

In Affinity.



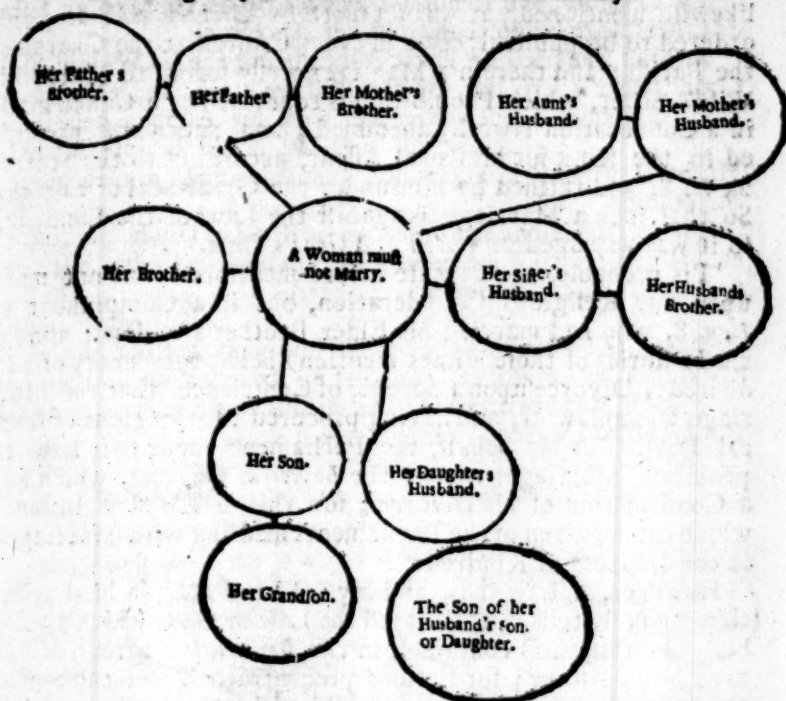
(i) Vaugh. 206. 2 Vent. 9. (k) 2 Levintz. 254. Raim. 464.

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In Consanguinity:

In Affinity:



'Tis to be observed upon these Degrees, that in Affinity the Man is prohibited to Marry his Uncle's Wife; the Text in *Leviticus* is his Father's Brother's Wife; but to Marry the Mother's Brother's Wife is within the same Degree, and that is not prohibited.

He is likewise forbidden to Marry his Brother's Wife, which was not prohibited by the *Jewish* Law generally, but only in Cases where the Brother died leaving Issue, for, if he had none, the surviving Brother was commanded to Marry the Widow.

He is also prohibited to Marry his Wife's Sister; but this was not forbidden to the *Jews*, but only during the Life of both Sisters, that the first Wife might not be vexed by her Husband's marrying her Sister, for Polygamy was allowed amongst the *Jews*.

About 23 Years after the making the aforesaid Statute, viz. Anno 5 *Elix.* there was a Table set forth by the Queen, in which the Degrees of Marriage were contained; and about 40 Years afterwards, viz. Anno 1 *Jac.* all Persons were prohibited by the * Canon to Marry within the Degrees prohibited by the Law of God, and expressed in that Table, and that Marriages otherwise contracted shall be incestuous.

* Can. 99.

In this Table, the Degrees of Consanguinity and Affinity are likewise mentioned; it was set forth by *Archbishop Parker*, and ordered to be publickly fixed in every Church at the Charge of the Parish; and therein a Man is expressly forbid to Marry his Wife's Sister, which Prohibition is confirmed by a Canon made in a Convocation lawfully assembled; and afterwards presented to the King for his Royal Assent, according to the Statute 25 *H. 8.* and ratified by him under the Great-Seal of *England*. So that such a Marriage is against the Law of the Land, and so it was adjudged in *† Hill and Good's Case*.

'Tis probable, the Statute before-mentioned was not made upon any Religious Consideration, but in a Compliment to *Hen. 8.* who had married his Elder Brother's Widow; and (as the Histories of those Times mention) being very weary of her, desired a Divorce upon a Scruple of Conscience, that the Marriage was unlawful; and having procured the Opinions of several Divines in his behalf, the Parliament made that Law to prohibit Marriages within the *Levitical* Degrees, which was a Confirmation of his Divorce; for this is the first Instance which can be given of the Parliaments meddling with Marriages, in the Degrees of Kindred:

However, a Law it is, and my (2) Lord *Coke*, in his Exposition upon it, tells us, That all the Law of God, which Prohibits Marriages, is contained in the *Levitical* Degrees, which must be a Mistake; for Persons precontracted, and those who are naturally Impotent, are prohibited by God's Law to Marry, because the end of Marriage is frustrated, where there is a natural Impotency in either Sex, and yet such Marriages are not prohibited by the Laws of *Moses*.

Impuberty.] Marriages *infra nubile annos* are unlawful; now the Age of Consent for a Man is 14 Years, and for a Woman 12 Years; and therefore if Two are married before the Age of Consent, and are divorced for that Reason after they come to full Age, the Woman may have an Affize for (a) Lands given to them in Frank Marriage, which shews that the Bond of Marriage is dissolved, for otherwise she could not have an Affize against her Husband.

It was for this Cause that (b) *Kenn* was divorced, and thereupon a Question did arise, *viz.* He had Issue by his Wife from whom he was divorced, and afterwards He married again, his first Wife being living, and he had likewise Issue by his second Wife, which Marriage was by Sentence in the Ecclesiastical Court declared to be lawful after his Death; the Question in the Court of Wards was, Who should be his lawful Heir? And it was adjudged that the Daughter of his second Wife should inherit; for though it was proved that he lived with his first

† *Vaugh.* 302. (2) 1 *Inft.* 235. (a) *Br. Abr.* fo. 224. *Plito* 6. (b) 7 *Rep.* 42.

Wife 10 Years before the Divorce, and were both of Age of Consent, yet such Consent should not be averred against a Sentence of Divorce, so long as it stood unrepealed, because the Ecclesiastical Judge had declared the Marriage void ; and he is Judge as well of the Age of Consent, as the Original Contract.

'Tis true, such Sentence of Divorce might be repealed after the Death of one of the Parties, in an Action at Common Law, where the Consent may be proved, when the Parties were of Age ; for the Divorce for *Impuberty* is but Evidence, and not Conclusive, because the Matter is properly triable in the Temporal Courts.

But tho' a Divorce may be repealed after the Death of the Parties, yet a Sentence of Divorce shall never be given after their Death, for that would be to bastardize their Issue.

Now, he who would bastardize an (c) Heir must make the Marriage void, by some Judgment legally executed ; but that cannot be done after the Death of one of the Parties, because the Marriage is then determined.

Frigitur.] This is a Term which relates only to the Man, who hath a Perpetual Inability to Generation ; and 'tis called *Arbitudo* or Impotency, when it relates to a Woman.

As to this Matter there happened a very remarkable Case, Anno 40 & 41 Eliz. which was thus ;

The Wife of one (d) Bury was divorced from him *Causâ frigidi-tatis*, it appearing that for Three Years after the Marriage she Remains *Virgo intacta propter perpetuam impotentiam* of her Husband ; he afterwards married again, and had Children ; and the Question was, Whether they were legitimate or not ? And adjudged that they were, because born during the Coverture, and before any Divorce had as to the Second Marriage, which they agreed to be voidable, but that it continu'd a Marriage till it was dissolved.

My Lord Coke tells us, a Writ of Error was brought upon this Judgment, and that it was affirmed in the *Queen's-Bench* upon great Deliberation ; but yet it seems to be a very hard Judgment, and the Distinction, which is there made, viz. That a Man may be *Habilis & inhabilis diversis temporibus*, is not applicable to the Circumstances of that Case ; 'tis true, a Man may be so, where the Inability is *Ex maleficio* ; but if a Man hath a Perpetual and Natural Impotency, 'tis impossible he should be *Habilis* at any Time ; and the Marriage in such Case is not voidable, but void *Ab initio*.

My Lord Anderson, who reports this Case, sets forth Part of the Libel in these Words, viz. That the Wife *Nunquam Carnaliter cognita fuit* (by Bury), *aut cognosci potuit, aut potest ; idq;*

(c) Bro. Abr. fo. 224. Plito 5. (d) Moor 225. And. 135. 5 Rep. 98. Dyer 179.

propter vitium perpetuum, & impotentiam generandi, quibus ante Matrimonium laborabat; qua impotentia & vitium generationis nulla Medicorum Arte, aut temporis cursu corrigi vel tolli potest: And yet he tells us it doth not appear by any special Words what was the Cause of that Sentence; now it seems plain, that those Words must import a Perpetual and Natural Impotency, and that he was divorced for that Cause, and if so, the Sentence was Wrong, because he had Children by another Woman, which would be impossible, if he was *Perpetuo frigidus*.

But 'tis to be observed, that the Reason of the Sentence beforemention'd is agreeable to the Civil Law, which requires that there should be a Cohabitation for Three Years, for the Trial of the Disability, before any Proof is allow'd to the contrary, unless it plainly appears upon the Oath of able Physicians; and upon Inspection of the Persons, that the Impotency is not accidental, but natural and incurable.

But the Inspection was introduc'd by the Canon Law; and if 'tis favourable to the Man, there is no Occasion of any other Proof, for he is to be inspected first, and if there is no Doubt of his Ability, then the Wife is spared; but if that is doubtful, the Wife is to be inspected, if she hath not been married before.

To the like Purpose was the Lady *Essex* Case, who, upon her Petition to King *James I.* obtain'd a Commission under the Great Seal, directed to the Archbishop of *Canterbury*, and to Five other Bishops, &c. to proceed in a Cause of Nullity of Marriage, between the Earl of *Essex* and her self, by Reason of his Frigidity.

The Libel against him was, that for Three Years after the Marriage they did cohabit as Man and Wife; but that, before and since the Marriage, he had a Perpetual Impotency, at least in respect to her.

The Earl replied, that he was *Frigidus quoad illam*, but not as to any other Woman, for he found that she was not *Apia* to have Children.

Thereupon the Commissioners appointed Three Ladies and Two Midwives to inspect her, who returned that she was *Apia*; and because the Law presumes that where there is Three Years Cohabitation after Marriage, *Et nil ad copulam*, there must be *Impotentia cocundi in viro*; which Disability, whether it proceeds from any natural Defect, or by any other Accident whatsoever, yet if it precede the Marriage, it shall convict the Man of Impotency, and by consequence make it void.

This was the Case of *Alphonso VI.* King of *Portugal*, who was divorced from the Queen by a Sentence, which imports, that they had done their best to consummate the Marriage without being able to succeed, and that the Fault was wholly in him, which proceeded from an Infirmary, which he had when he was a Child, and was now incurable; so that the Impotency being certain, there was no Occasion of Inspection, or of Cohabitation

tion for Three Years, as a farther Proof, therefore the Marriage was declar'd to be *de facto*, and not *de jure*; and it was void.

Adultery.] For Adultery there may be a Divorce, *A Mensa & Thoro*, but the Marriage still continues; therefore, if the (e) Husband after such a Divorce releases a Bond made to his Wife before the Coverture, 'tis good.

But yet after such a Divorce, the (f) Wife may sue alone in the Spiritual Court, for a Defamation; and the Husband's Release in such Case is not good, because the Suit was merely for a Spiritual Matter, 'tis to restore her to her Credit and Reputation; and the Costs are not given to recompence any Damage, but only *Pro Expensis litis*; so nothing is vested in the Husband upon which this Release might operate.

'Tis true, if after such a Divorce the Woman will sue alone for a Legacy, the Release of the Husband shall be good, because the (g) Legacy was once vested in him by the Intermarriage; and the Suit brought by the Woman was for a real Interest in the Thing it self, which she had lost by the Intermarriage.

She may likewise bring a Writ of Dower after the Death of her Husband.

St. Matthew tells us, (b) *That whosoever shall put away his Wife (except 'tis for Fornication) and shall marry another, committeth Adultery*; from whence it hath been concluded, that where the Divorce is for Fornication, the innocent Person might marry again without being Adulterous.

But the Words of the other Evangelists being general, and without any Exception, are indefinitely against Marriages, after any Manner of Divorce, as thus, (i) *Whosoever shall put away his Wife, and marryeth another, committeth Adultery*; and *whosoever Marrieth her who is put away committeth Adultery*; and (k) St. Paul tells us, *That the Wife should not depart from her Husband, but if she departs let her remain unmarried*.

Now the Answer to this may be, That where an inspired Writer asserts a Thing fully in one Place, and not so full in another, that must be expounded by the Place which is most full.

'Tis probable, that upon the Authority of these Scriptures the * Canon Law is against Second Marriage, after any Divorce, whilst both Parties are Living, by which Law there is a Restraint in the very Sentence it self (*viz.*) that the Parties separated *A Mensa & Thoro* shall live chastly, and not marry during each others Life, and that no Sentence of Divorce shall be pronounced, until the Party requiring the same shall give good Security and Caution to the Court not to break the said Prohibition; and if the Judge shall give Sentence in any other Man-

(e) Cro. Eliz. 908. Moor 605. 683. (f) 3 Bulst. 264. NoY 108. Godb. 345. 1 Rol. Rep. 426. 2 Rol. Abr. 298. (g) 2 Rol. Abr. 301. (h) 19 Mat. 9. (i) 10 Mark 11. 16 Luke 29. (k) 1 Cor. 7. 11. * Canon 107.

ner, (1) he shall be suspended from the Exercise of his Office for a Year, and that the Sentence shall be void.

Now, in all these Sentences of Divorce, or rather Separation *A Mensa & Thoro*, the Civil Law requires that there should be this Clause, viz. *Distos J. & S. scilicet Partes illas quæ cupiunt divortium, ratione Adulterii allegati & probati a Thoro & Mensa, ac mutua Cohabitatione, ac Obsequiorum Conjugalium impensione, donec, & quousq; duxerint invicem reconciliandos, & non aliter, nec alio modo separamus*; and not only the Security beforementioned is to be given, but the Judge himself is requir'd expressly to inhibit the Parties from marrying again, and to admonish them to live singly till reconcil'd, and if they marry afterwards, 'tis accounted by the Canon Law to be Adulterous, and the Parties may be punished in the Spiritual Court.

But this Separation, whilst the Bond of Marriage still continued, was an Invention of the Canonists, for the ancient Fathers of the Church had no Notion of it; they were of Opinion that the Bond of Marriage was actually dissolved in Cases of Adultery, especially where the Woman was an Adulteress, because the End of Marriage being to ascertain the Issue, and the Contract it self being no more than a mutual Transferring the Right to each others Person, in order to that End; therefore, the breaking that Contract doth naturally infer that the Marriage is dissolved, and the rather, because the End of Marriage it self is destroyed.

I shall conclude this Head with the famous Case of the Marchioness of Northampton, who was convicted of Adultery in the Reign of Hen. 8. and the Marquess was divorced from her in the Beginning of the Reign of Ed. 6. and thereupon a Commission was granted, and directed to Archbishop Cranmer, and to Nine other Divines, to certify whether she continued his Wife, notwithstanding the Divorce *A Mensa & Thoro*, and whether by the Word of God he might marry another.

But, before this Matter was determined, the Marquess married again; at which the Privy Council were offended, because, according to the Canon Law, the first Marriage was good, and continued after such a Divorce.

The Marquess insisted, that by the Law of God the very Bond of Marriage was dissolved for Adultery, and that Marriage it self was never thought to be indissoluble till the Church of Rome had made it a Sacrament, but yet that Church by the Help of the Canonists had invented such Distinctions which made it easy to be avoided.

That it would be very Inconvenient if a Marriage should not be dissolved for Adultery, because then the innocent Person might live with the guilty, or be tempted to commit the like Sin, if the Bond of Marriage till continued.

(1) Canon. 108.

In some short Time afterwards the Delegates gave Judgment in Favour of the Second Marriage ; and amongst other Things they founded it upon the Definition our Saviour made of Marriage,

That Two should be One Flesh ; so that when that was divided, as it must be by Adultery, the Marriage it self was dissolved.

That St. Paul, speaking of an Unbeliever departing from his Wife, tells us, that in such Case the Believing Party is not under Bondage, which is an Intimation that the Bond is dissolved meerly for forsaking his Wife, and if so, it must certainly be dissolved for Adultery.

'Tis true, the (a) Sentence, given by these Delegates, was about Four Years afterwards confirmed by a private Act of Parliament, to which Two Peers and Two Bishops dissented, and the Second Marriage was declared to be good by the Law of God, any Canon or Ecclesiastical Law to the contrary notwithstanding.

But in the very next Year, viz. Anno 1553. that Act was repealed ; and the Reason is mentioned in the Preamble, viz. because it was obtain'd upon private Respects, and that it was an Incouragement for licentious Persons to procure Divorces upon false Allegations.

Propter Sacvitiam.] A Divorce *Causa Sacvitia* is grounded *Ex jure Nature* ; for since Marriage was instituted in a State of Innocence, it must of Consequence be for the mutual Comfort and Help of each other, and therefore a cruel and severe Usage frustrates one of the Ends of that State.

The Spiritual Court hath a proper Jurisdiction in Cases of this Nature, and we have instances of Suits brought there by the Wife for a Separation, *Propter Sacvitiam* ; and in one * Case Sentence was given for the Husband against the Wife, yet he was forced to pay all the Costs for her ; afterwards the Wife brought an Appeal, and because the Husband would not appear and answer, and pay for the transmitting the Record, he was excommunicated ; and the Court of Common Pleas doubted whether they should grant a Prohibition, because the Proceedings were according to the Course and Practice of the Ecclesiastical Courts.

The Wife of one Porter was † divorced from him for the same Cause, but it was *A Mensa & Thoro* only ; for this Sort of Divorce gives the Woman Liberty to live separately from her Husband ; and 'tis no more than a Provision for her Safety, and to avoid his cruel Misusage, for she cannot marry again during his Life, without being in danger of committing ‖ Felony.

Lastly, There is some Difference as to Lands and Goods of Persons divorced.

(a) B. H. R. 2 Pf. 192. * Cro. Car. 16. † Cro. Car. 461, ‖ 1 Jac. cap. 11.

For if Lands are given to * Husband and Wife, and to the Heirs of their Bodies begotten, and afterwards they are divorced, they shall have only a Freehold for their respective Lives; but their Children shall never inherit, for that is lost by the Divorce.

If they are joint Purchasers, and afterwards divorced, they shall hold by Moities.

As to Goods, if a † Woman, who hath a Personal Estate, marieth and is divorced, she shall have her Goods again; but if the Husband had disposed or sold them during the Coverture, she is without Remedy.

Donative.

THIS is a Benefice collated by the Patron to an Ecclesiastical Person, without Presentation to the Bishop, or any Institution by him, or Induction by his Order.

But this Collation must be to a Priest lawfully ordain'd, because every Donative must be of a Parsonage-Vicaridge, or other Ecclesiastical Dignity within the Statute 14 Car. cap. 4. and the Collatee ought to take the Oaths, and make the Subscriptions pursuant to that Statute.

The Original of these Donatives was either,

1. By a Royal License, Or,
2. By some particular Privilege.

As to the first, the Queen, by her Letters-Patents, may License any Person to found a Chappel, and may appoint that it shall be a *Donative*, and not presentable, and that the Incumbent shall be deprived by the Founder and his Heirs.

As to the other, there have been peculiar Privileges granted to Lords of Mannors, who had several Tenants living remote from the Church to erect Chappels for them, and some for the Conveniency of such Lords and their Families, with Liberty to put in whom they would, so as he was a Man in Holy Orders; and the Bishops in those Days granted these Privileges to encourage so good an Undertaking, which, having been continu'd Time out of Mind, do now turn to a Prescription.

There are some, but not many of these Donatives in *England*, and they differ in every Thing from other Ecclesiastical Livings; as for instance,

They are not presentable, unless made so by the Patron, (a) but if he will present to the Bishop, and his Clerk should be admitted, instituted and inducted, upon such Presentation, it shall never be a Donative afterwards, but subject to the Jurisdiction of the Ordinary, and in all other Cases shall be like other Church Livings, but this must be understood where such Presentation is made by the rightful Patron; for if 'tis done by a

* Bro. Abr. 254. Plito 9. † Bro. Abr. fo. 224. Plito 1. (a) Co. Lit. 344. 2 Rol. Abr. 342. Cro. Eliz. 653.

Stranger, tho' his Clerk should be instituted and inducted, yet it shall not make it Presentative, because a Presentation by Usurpation in the Case of a Donative is void in it self, for that is not presentable, unless by the true Patron.

'Tis not subject to a Lapse, either to the Bishop or the Queen, but the Patron may be compelled by Ecclesiastical Censures to fill the Church, and when 'tis full the Incumbent must subscribe the Declaration, and take the Oaths enjoined by the Statutes, (b) as all other Clergymen are bound to do; and if 'tis a Benefice with *Cure of Souls*, he must subscribe the 39 Articles.

But it hath been a Question whether a Donative can be a Benefice *with Cure*, &c. because in the strict Acceptation of the Word, it signifies a Living which is gain'd by Institution and Induction, which is agreeable to the (c) Canon Law, viz. That all Ecclesiastical Livings shall be had by Institution, either by the Bishop or his Chancellor, or by those who have Episcopal Jurisdiction; and without such Institution a Benefice can neither be lawfully had or retain'd; but there are some Instances to the contrary.

For the Church of the Tower of *London* is a Donative, and in the Queen's Gift; and 'tis a Benefice with Cure of Souls, and the Incumbent comes in without Institution, &c.

Neither doth every Institution suppose a Cure of Souls, for the Queen hath several Donatives in *Wales* (d), but yet the Incumbents are instituted by their respective Ordinaries.

The Deans of Cathedrals do not come to their Deanries by Institution, and in that they resemble Donatives, but they are not so, because they are subject to Episcopal Visitations; besides, their Grants of any of their Possessions must be confirmed by the Bishop and Chapter, tho' the Queen is Patroneess of the Deanry; but Grants made by Incumbents of Donatives must be confirmed by the Patron.

As to the Patron's being compelled to present by Ecclesiastical Censures, my Lord *Rolls* (e) tells us, that it was adjudged to the contrary in *Fairchild* and *Gayre's* Case, that the Ordinary may sequester the Living in Case of Refusal, and that he may deprive the Incumbent if he sees just Cause, in both which Points I think he is mistaken.

This Case is reported in several Books which I have perused, and can find no such Thing (f), but rather the contrary; for Justice *Croke* doth not mention either the Sequestration of the Profits, or Deprivation of the Incumbent: *Brownlow* hath transcribed this Case out of *Telverton verbatim*, where we find the Chief Justice *Popham* of Opinion, that if an Incumbent of a Donative preaches Heresy, the Ordinary may correct

(b) 14 Car. 2. 1 W. & M. (c) Decret. Lib. 3. (d) Sid. 427.
(e) 1 Rol. Rep. 453. (f) Cro. Eliz. 653. 2 Cro. 63. Yel. 6.
2 Mar. 1765. 1 Brownl. 201.

him, for his Person is not exempted from that Jurisdiction, tho' the Place is.

But the other Judges were of a contrary Opinion. *viz.* That his Person is privileged by reason of the Place; that the Patron and not the Ordinary may deprive him, if he hath a just Cause so to do; and so 'tis in Serjeant *Moor's* Report, *viz.* That he is subject to the Visitation and Correction of the Patron, but neither of them speak any Thing of a Sequestration by the Ordinary.

'Tis therefore the undoubted Right of the Patron to visit and deprive; but if the Incumbent will resign, it must be to him, and not to the Ordinary; and if he is disturbed in collating his Clerk, he may have a *Quare Impedit* against the Bishop and the Disturber, but that would be to admit himself out of Possession, and therefore 'tis more advisable to try the Right in an Ejectment, or in an Action of Trespass, in which the Plaintiff must certainly recover, because a Donative cannot be filled by Presentation.

But if he should recover in a *Quare Impedit* the Writ must be directed to the Sheriff to put the Clerk in Possession.

Now this Right which the Patron hath to visit comes thus, *viz.* If the Queen doth found a Church or Chappel, she may exempt it from the Visitation of the Bishop, and in such Case the Lord Chancellor may visit by Virtue of a Special Commission for that Purpose; but if she gives License to a Subject to found a Church or Chappel, and exempt it from the Jurisdiction of the Ordinary; 'tis visitable by the Founder and his Heirs, and this was the Original of all the Donatives in England.

However, whether 'tis a Benefice *with Cure* or not, 'tis safe for the Collatee to * subscribe the 39 Articles in the Presence of the Ordinary of the Diocese, and likewise to read the said Articles within Two Months after he hath Possession, and also to read the Morning and Evening Prayers in his Church within that Time, and to declare his Assent and Consent thereunto, otherwise by the Statute 14 *Car. 2. cap. 4.* his Living becomes void.

Lastly, Marriages may be made there without License; and therefore, if any One should libel against an Incumbent of a Donative, for such Marriages; 'tis a good Suggestion to alledge that the Church is a Donative, and that the Donor may appoint Commissioners *De jure* to visit and inspect, and that the Ordinary ought not to intermeddle. *Sid. 432.*

* 1 Inst. 144. 2 Cro. 63.

Duplex Querela.

AS the Patron hath a Remedy at Law by a *Quare Impedit*, where a Bishop refuses to institute the Person presented, so likewise the Clerk hath a proper Remedy in the Ecclesiastical Court; for he may complain to the Arches if he is refused by a Bishop, and to the Delegates where the Refusal is by the Archbishop: And upon this Complaint, the Dean of the Arches writes to the Bishop *in forma juris*, which Writing is called *Duplex Querela*.

But because by the * Canon the Bishop hath 28 Days to inform himself of the Sufficiency of the Clerk after the Presentation is tendered to him, therefore by the same Canon 'tis enjoined that a *Duplex Querela* shall not be granted 'till that Time is expired, and Oath made thereof, and that the Bishop refused to grant Institution, or enter into Bond with Sureties to prove the same to be true, and this under Pain of Suspension of the Grantor from the Execution of his Office for half a Year, to be denounced by the Archbishop, and that the *Duplex Querela* shall be void; in which Canon there is a Provision, that the Bishop shall not institute another in the mean Time with Prejudice to the Person presented, *sub panâ nullitatis*.

As to the Form of this Rescript, and the Proceedings on it, 'tis as followeth.

'Tis to contain a Monition, that within Five or Nine Days the Bishop should admit the Party complaining, and also a Citation for him to appear by himself, or Proctor, at another Day, in case he should refuse so to do, and then to shew cause of his Refusal; there is also an Inhibition to him pursuant to the Canon before-mentioned, not to admit another *pendente lite*.

The Proceedings upon it are thus, *viz.* the Clerk who hath got the Presentation must procure some Person to admonish the Bishop to admit him within the Time mentioned in the *Duplex Querela*; and Three Days afterwards the said Clerk ought to apply himself to the Bishop and pray Institution, and tender himself to subscribe the 39 Articles, and to take the Oaths of Supremacy and Canonical Obedience; and this he ought to do twice more, *infra dies præscriptos in duplici querelâ*, and if he cannot be admitted to the Presence of the Bishop, then he ought to make his Protestation in the Presence of some credible Witnesses.

The Bishop, after such Admonition, refusing to admit the Clerk, may be cited by a Messenger to appear; and if that cannot be done personally, then the Messenger may acquaint the Bishop's Servants, that he hath such a Citation, *ad Instantiam R. B.* to institute him to such a Benefice.

* Can. 95.

Then after the Day on which he should have appear'd, if he had been personally cited, the Court will decree a Citation *vis & moris*, which must be personally executed if that can be done, if not, then it must be fixed to the outward Doors of his Palace, House, or Cathedral.

Afterwards the Day of executing the Monition and the Inhibition, the several Days on which the Clerk prayed Institution, the Day of his citing the Bishop, and of his Refusal to admit, &c. are to be certified by the Person citing; and this is to be done on the back of the *Duplex Querela*.

Then the Bishop, after Three Proclamations, is adjudged *Contumax*, and the Judge pronounces the Right of Institution to be devolved on him, and decrees that the Clerk shall be instituted, and that he will write to the Archdeacon to induct him.

Then the Clerk must apply himself to the Archbishop to examine him, and if he approves him, then he writes to the Judge, *fiat institutio*; but before he is instituted, 'tis usual for the Clerk to give Bond to indemnify the Judge.

If the Bishop doth appear and alledge a Cause of his Refusal to admit the Person, as that the Church is full, or that the Person presented is a *Simonaick*, unlearned, &c. then they are to proceed to Tryal; and if the Bishop fails in his Proof, then the Judge pronounces Sentence for his own Jurisdiction, and condemns the Bishop in Costs.

But if the Bishop will not defend the Suit, the pretended Incumbent may do it, and alledge that the Church is full of himself; but then the Judge will first pronounce Sentence for his own Jurisdiction, because the Bishop hath alledged nothing to oppose it.

But if the Bishop will allow such Incumbent to defend the Suit in his own Name, then the Judge cannot decree for his own Jurisdiction until the Cause is determined.

And in this case where the Bishop appears and refuses to institute, 'tis not a sufficient cause for him to alledge that Two Persons are presented to the same Living, and so the Church is become litigious; because, if it was so, he ought to proceed upon a *ius patronatus* to try the Right, but if not, and one of them appears to the Judge to be incapable, or otherwise deficient, he may admit the other without any Inquisition upon a *ius patronatus*, because the Right of Institution is *pro hac vice* devolved on him thro' the Negligence of the Bishop.

There are not many Instances of this way of Proceeding in our Books, some there are.

Sir *Timothy Hutton's* (g) Clerk was instituted by the Archbishop of York, and inducted by his Warrant upon the Refusal of the Bishop of Chester to admit him.

'Tis true, there was another presented to the Church who sued the Incumbent in the Delegates, suggesting that his Institution was void, because it was done by the Archbishop out of his Province in Time of Parliament at *Westminster*, and by consequence the Induction must be void; but a Prohibition was granted, because the Church was full by Induction, which is a Temporal Act, and which shall never be avoided but by a Suit in the Temporal Courts:

Therefore a *Duplex Querela* will not be a proper Remedy where another Person is inducted; but if Two Patrons pretending a Title (*b*) to Present, do each of them grant a Presentation to his Clerk, and the Bishop refuseth one who brings his *Duplex Querela*, and upon that obtains Institution and Induction, and afterwards the Bishop grants Institution to the other, the Suit shall still go on in the Spiritual Court to punish the Bishop for a Contempt in granting Institution after an Inhibition, and *pendente lite*; but *quoad* the Incumbency a Prohibition was granted.

But in such case (*i*) if the Bishop had refused both their Clerks, and then one of the Patrons had brought a *Quare Impedit* against him, and pending that Writ a *Duplex Querela* had been brought by the other, and upon the Neglect of the Bishop to appear, the Archbishop had granted Institution to the Clerk of that Patron, though he had been Incumbent for Six Months, yet he should be removed if the other Patron recover in the *Quare Impedit* because he came in *pendente lite*.

This way of Proceeding against the Bishop is proper, where the Refusal is for Incapacity, or any other personal Defect in the Clerk, because those are Causes which the Spiritual Judge may try.

So if the Refusal is upon Pretence that the Church is full, because the Plenarty arising upon Institution shall be tried by the Certificate of the Bishop.

Ecclesiastical Law. See Canons.

TH^O' the *Common Law* is distinct from the *Ecclesiastical*, yet 'tis not exclusive of it, for both are consistent with the Rights and Liberties of the People, and both are established upon the same Foundation; for as the *Common Law*, by which our Civil Rights are determined, is made up of such Customs which, by the general Consent of the People, have Time out of Mind obtained the force of Laws, so the *Ecclesiastical Law* is made up of such *Canons* and *Constitutions*, which have been received and approved by the People, and which by Immemorial Practice have been used in our National Church.

(*b*) Moor 879. 1 Leon. 181. (*i*) 2 Roll. Abr. 391. Moor 572. This

This Church is divided into Two Provinces, and govern'd by Two Archbishops, who have a Right to consecrate Suffragan Bishops, to visit each Diocess within their respective Provinces in such manner as is settled by Custom, the Right of receiving Appeals in Ecclesiastical Causes, the Custody of vacant Sees, &c.

Then the Bishops in each Diocess have a Right of Jurisdiction over their Clergy, which is as ancient as Christianity it self; for as soon as a Church was built, there was a Bishop set over it, who had Authority to proceed against the Clergy according to the Canons.

And to shew that the *Common Law* doth not exclude the Spiritual Law, 'tis to be observed, that, when it was restored to our Ancestors by the *Magna Charta* of King *John*, the very first Paragraph of that Charter secures the Rights and Liberties of the Church, that is, as my Lord *Coke* (k) tells us, all their lawful Jurisdictions.

Now admitting that by *Magna Charta* it appears, that 'tis the Fundamental Right of the People to be tried by their Peers, that is, by Juries which is not used in the Spiritual Courts; yet this is no Argument that the Proceedings in those Courts are inconsistent with our Rights, for if it should, the same may be alledged against the Courts of Equity and Admiralty, who do not proceed according to the course of Common Law.

'Tis true, these words in *Magna Charta*, *Nec super eum ibimus nec mittimus nisi per legale iudicium parium suorum* must relate to Tryals by Juries; but then those words which immediately follow, *viz. Vel per legem terra* must extend to any other customary way of Tryal allowed by the Law of the Land.

We often say, that such a Thing is so at *Common Law*, by which we really mean, that it was so according to the feudal Law received here, which was originally instituted to keep the People under a Military Service; and though it was a Law which had its Rise from abroad, yet 'tis become part of the *Common Law* by being generally received here; as for instance, 'tis part of the *Common Law* that Lands of Inheritance shall Heirneally descend: This is agreeable to the feudal Law, because it was to go to him who was most likely to perform some Military Service.

I must confess, my Lord *Coke* gives another Reason for it, (l) and 'tis a very weighty one; for he tells us, that Lands descend, because they are Ponderous, which Reason would hold in *Holland* as well as here, but there 'tis otherwise.

'Tis after this manner that several Canons made in Foreign Nations are now become part of the Laws of this Land, not by Virtue of any Authority from the Pope or any other Poten-

(k) 2 Inst. 3. (l) In *Ratcliffe's Case*.

tate, but by being received Time out of Mind, and allowed to pass for Law among us; which, together with those ancient Canons made in Provincial Councils at home, and which have been received by a general Consent, do make up the Body of the Ecclesiastical Laws of this Realm.

Examination. See *Bishop.* *Exchange of Benefices.* See *Resignation.*

Excommunication.

TIS certain this is a Punishment which for many Ages hath been used in the Church by removing scandalous and wicked Persons from receiving the Sacraments, and from the Fellowship of Christians in general, and that the Sentence was usually pronounced by the Bishop himself; and that, after Spiritual Courts were established, it was always given in those Courts.

Our Ecclesiastical Histories tell us, that the *African* Church was the Glory of her Age whilst she kept her Discipline uncorrupt, but as soon as she became remiss in it, she by degrees was over-run with more *Hereticks* and *Schismaticks* than any other Christian Church, and at last wholly destroyed; so that where once Christianity flourished in the greatest Purity, there is not at this Day the least Remains of it to be seen.

And though, by the Depravity of this Age, this Discipline is so much despised, that 'tis look'd upon to be no more than *Brutum fulmen*; yet the Sentence it self is not the less dreadful, for being contemned by Men of corrupt Principles, who had rather live in their Sins than be reformed by Penance.

'Tis a true Observation, that those Persons, who are the most Profligate in their Morals, who make a Jest of Religion, and who live securely in Sin and Folly, are likewise the only Men who represent the Censures of the Church to be insignificant Trifles, when the wiser part of Mankind do believe that such Censures are absolutely necessary, even upon the Principles of *Natural Reason*; for they were practised by the *Gentiles*, who had no other Light to direct them, and likewise the *Jews* themselves, to whom the Will of God was revealed, and afterwards introduced into the Church by our Saviour himself.

As to the *Gentiles*, it must be admitted, that Government is absolutely necessary in all manner of Societies, and that 'tis impossible they should subsist, without a Power lodged somewhere to punish those Persons, who break the Rules and Orders by which the Government should be preserved.

Therefore, among the Heathens, who had Forms of Government in their Idolatrous Assemblies, there are several Instances of their Priests, excluding wicked Persons from the Sacrifices; and this was only by the Instigation of *Natural Reason*.

Thus *Lucan* tells us of *Peon*,

Solitus templis arcere nocentes.

And *Virgil's* Priests, when they were about to sacrifice to their Gods, made publick Proclamation to the People,

———— *Procul, ob procul este propbani!*
 ———— *Totoque abfistite Loco.*

And this Monitory Excommunication was held so sacred among them, that not a Man dar'd to be present at the Sacrifice, who was conscious to himself that he was then under the guilt of any notorious Crime.

To come nearer home, the *Druids*, who were the chief Priests among the barbarous *Gauls*, forbad those Persons who disobeyed their Decrees to approach their Sacrifices; and this was esteemed in those Days to be the greatest Punishment that those Heathens could inflict on the Offenders, for they lost all Conversation among Men, and were deprived of the Benefit of the Law.

Then as to the *Jews*, some Men are of Opinion, that what was done in the Patriarchial Times, was to be a Guide to them when they became the peculiar People of God: Therefore, the casting *Adam* out of Paradise, the grievous Censure upon *Cain*, the Curse of *Noah* upon *Cham*, for despising his Father, and that of *Jacob* upon his Two Sons, *Simeon* and *Levi*, who had murdered the *Shechemites*: These and many more Instances shew that God would have notorious Offenders cast out of his Presence, and that such were not worthy of the Company of his People.

'Tis very true, there are not many Instances of Excommunications under the *Ceremonial Law*; some there are, as that of the (a) Tribe of *Benjamin*, which was pronounced in a Religious Assembly to be accursed, and the People obliged themselves by a Solemn Oath not to converse with them.

Now, the true Reason why we have so few Instances of Excommunications under that Law, may be because the Government among the *Jews* was then a *Theocracy*. There was no manner of distinction between Temporal and Spiritual Courts, for the Priests were vested with a Power to punish all Offenders; and some were punished by God himself in a peculiar manner, viz. by striking them with Leprosies, as he did *Miriam*, *Uzziah*, *Gebazi*, &c. And this was an effectual Excommunication, because, by the *Jewish* Law, such leprous Persons were always excluded the Congregation of the Faithful.

Sometimes he punished Men with sudden Death, as *Corah* and his Companions; so that it was not necessary for the Priests always to interpose, and by their Power to Excommunicate

(a) Judges 20. 12.

Immoral and Scandalous Men, because God himself often inflicted the Punishment on them :

Besides, whilst the *Jews* were thus governed, all little Offences were expiated by Sacrifices, and the Priest reconciled the Offender to God and the Church ; and where God did not immediately punish for great Offences, the Priest always pronounced his Sentence, which shew'd it was the Divine Will, that, whilst the *Jews* were under the State of *Theocracy*, lewd and vicious Persons should be punished by those who were the Governors of the Church.

After the Birth of Christ, and when the *Jews* became Tributary to the *Romans*, we find that the chief Men among them decreed, whosoever confessed Christ should be excommunicated.

This made several of the *Sanhedrim* afraid, lest they should be cast out of the Synagogue, and that was a Punishment by which Men were excluded from all Religious as well as Civil Conversation.

I know Mr. *Selden* would have this casting out of the Synagogue to be a Punishment inflicted by the Temporal Magistrate, and to be only an interdict from Civil Commerce, because Temporal Affairs were transacted there.

But the very Notion of the Word is enough to convince one that the casting out of the Synagogue was an interdict from Religious Assemblies, because at first that was a Place peculiarly set apart for Religious Worship, and always used for that purpose, till the *Jews* were made subject to the *Romans*, and then some Causes, which they were unwilling to have redressed by those Heathens, were privately determined among themselves in their Synagogues, and sometimes Offenders were punished there by Whipping.

But this was contrary to the established Usage and Custom, for those were certainly Places of Religious Worship ; our Saviour himself takes Notice that the *Pharisees* stood Praying in their Synagogues : And because throughout the whole Land of *Canaan* there was but one great Temple, where all the *Jews* assembled at some solemn Times in the Year, therefore it was necessary that the lesser Places should be set apart for Religious Worship all the rest of the Year, and those were their Synagogues.

Among the Christians there is a Church composed of a Society or Corporation of Persons converted at first by our Saviour and his Apostles, to whom he gave the Government of that Society, and Laws and Rules distinct from the Civil State ; and as in all other Governments, so in this of the Church 'tis natural that a Power should be lodged at first in those Spiritual Governors, and afterwards in their Successors, to punish those who transgress against those Rules.

Therefore, when St. *Peter*, in the Name of the rest of the Apostles, acknowledged Christ to be the Son of God, he replied, thou art *Peter*, (which Word in the Original signifies a Rock) upon which Rock (that is, upon the Confession of his Faith in Christ) he would build his Church; and then tells him that he would give them the Keys of the Kingdom of Heaven, and that whosoever he should bind in Earth should be bound in Heaven.

'Tis probable our Saviour might use this Metaphor of the Keys, because the Church is usually compared to a House, the Keys whereof belong to him who hath the chief Care of the Family; so that the Keys, which he gave to St. *Peter* and his Successors, was only a Power to admit some Persons into the Church, and exclude others by Excommunicating them from the Company of the Faithful; and since he gave them no Temporal Power, 'tis evident they have no other Method to punish Offenders, but by turning them out of the Communion of the Church: And this is not such an insignificant Punishment as some Men fancy, for our Saviour positively, and without a Metaphor, tells us, that whosoever Sins they remit shall be remitted, and whosoever they retain shall be retained.

Now, the best Expositors of these words tell us, that by the Pronoun (*they*) the Governors of the Church are signified; that by Remission is meant an Absolution upon Repentance; and by Retaining we must understand a continuing Impenitent, and so not capable of a Pardon under the Guilt of Sins.

So that where the Governors of the Church ground their Censures upon a Doctrine which is true, and if it appears so to the Person himself who is censured, and yet he will obstinately despise it, in such case he despises the Ministers of Christ who sent them, in whose Name, and by whose Authority the Sentence was pronounced.

It was a Sentence which exposed a Man to more Temporal Misfortunes, than any which was pronounced by Civil Magistrates, for their Judgments did not suppress the Accounts and Offices of Humanity, much less the Duties of Consanguinity; but Excommunication armed the Father against the Son, and the Children against their Parents; it stifled all the Sentiments of Nature; it broke all the Bonds of Friendship and Hospitality, and reduced the Criminal to the Condition of such who were infected with the Plague; and as often as he went abroad, he was look'd upon as a Monster: And yet 'tis certain, that in these Primitive Times, when Discipline was vigorously exerted with Severity, the Church was then in the highest Reputation, and had no occasion to be protected by the Civil Powers; for the Purity of her Doctrine, co-operating with the Exactness of her Discipline, brought more real Proselytes to her in those Ages, than have been converted since that Time.

And

And it was by this means that *Calvin* himself attempted to make Converts from the Church of *Rome*; for he took care to establish a Form of Discipline in *Geneva*, and such a Consistorial Jurisdiction, which had Power to exercise Canonical Censures, and punish even to Excommunication; and on all Occasions he maintained the Right of his Consistory with an inflexible Severity.

This being the Original of Excommunication, I shall now shew that it hath been practised ever since in the *Christian Church*; and that *St. Peter*, to whom this Power was first given, was the first who executed it, upon *Simon Magus*, for his Hypocrisy; he was Baptized, and pretended to be a Believer, but it was to no other purpose, but that he might purchase of the Apostles a Power of doing Miracles, for which he offered them Money, but *St. Peter* curled him and his Money, and told him that he had neither Part or Fellowship with them.

In like manner *St. Paul* delivered *Hymeneus* and *Alexander* unto *Satan*, and ordered the incestuous Person at *Corinth*, who had brought such a Scandal upon the Christian Religion, to be delivered likewise to *Satan*; which was the Form of Excommunication then used, and for a long Time afterwards.

The Apostles, after they had planted Churches, took care to vest the Bishops whom they placed there with this Power, and they executed it in the purest Ages, upon *Cerdon* and *Marcion*, and such other Hereticks who lived soon after them; and this they did a long Time before the Empire became Christian, and by consequence before they had any Power or Assistance from the Temporal Magistrate.

It was then that the Nature of this Church-Power was best understood, and as it was never used by the Apostles but upon great and extraordinary Occasions, as upon those who preached another Gospel, and upon such who did not love the Lord, so it was never practised by those primitive Bishops, but upon Apostates, Hereticks, and other very Scandalous Persons, whom they would not suffer to be in their Communion, till, by a sober and solemn Profession of their Repentance, they were re-admitted to some part of Religious Worship; but they were not suffered to stand amongst the rest till they had passed through several Degrees of Penance, and so were gradually received into the Church.

So that this Power is for Edification, and not for Destruction, and never to be used but upon such Sinners who are wilful and obstinate, and who live in a deliberate Contempt of the Rules and Orders of the Church; and those Bishops, who were at first vested with this Power, and their Successors, for many Ages, kept within the Bounds of their Spiritual Jurisdiction; they were always obedient themselves to Magistrates, and never assumed any coercive Power over the Estates or Bodies of Men. Pope *Gregory VII.* called *Hildebrand*, was the First who

made use of it, by deposing *Hen. 4.* and this was not till the Eleventh Century, and in the Reign of our *William* called the Conqueror.

We have a famous Instance as to this Matter, in the Case of *Paulus Samosatensis*, who was deposed from his Bishoprick by the Council of *Antioch*, but he still kept Possession of the Palace; and the Fathers of that Council did not pretend to remove him, for that was done by the Assistance of the Emperor *Aurelian*.

And 'tis observable, that those Bishops had never greater Reverence, than when they alone exercised this Spiritual Power of Excommunication, for then the Christians paid them so much respect, that they never travelled into Foreign Parts without Credentials from their proper Bishops; some of which were called *Commendatory Epistles*, and those were granted to Persons of Note and Distinction; some were called *Communicatory Epistles*, and those were granted to such Persons who were in the Communion of the Church; and some were called *Epistola Dimissoria*, and those were granted to the Clergy when they were to settle themselves under another Bishop, and all these Epistles were comprehended under the general Name of *Litteræ Formatae*, because they were written in a peculiar Form and Character.

The Church at that Time had no Dependence on the State, it was a Spiritual Society by its self, and as such it subsisted for some Ages, and whilst its Censures were pronounced for great Offences they were esteemed Divine, and were in order to reform the Criminal, and to prevent the Judgments to come; and if People were as really convinced now as they were formerly, that there was no Salvation to be had out of the Communion of the Church, they would certainly dread Excommunication, which deprives them of that Communion, as much now as they did in the first Ages of Christianity.

'Tis a vain Objection to alledge, that, since the Empire became Christian, the Civil Magistrate had a Power to punish all Crimes; so that now there is no Necessity of Excommunication by the Church; for 'tis certain, that, after *Constantine's* Time, the Bishops did excommunicate without any Assistance from the Magistrate; and *Arrius* himself was first excommunicated by the Bishop of *Alexandria*, before any Application was made to the Emperor.

This was the constant Practice when Christianity was encouraged, and when it was under no manner of Persecution; and in Conformity to this Practice it was declared by several Councils, that it was a Power legally vested in Bishops, but because they might be subject to Mistakes, therefore Appeals were decreed from their Censures to a Synod, but never to the Emperor.

But

But as Animositities about different Opinions encreased, and when Men became formed into Parties, then they excommunicated one another for little Matters, in which they differed, till at last Excommunication had not that awe upon Men, as it had at first, and so by Degrees the Authority of the Sentence came to be despised.

Then also the Spiritual and Temporal Courts did, by turns, encroach upon each other, which was never attempted before. 'Tis true, Princes had put restraints upon the excess of this Power, by Ecclesiastical Courts, and particularly here in *England*; for *William*, called the Conqueror, would not suffer any of his Ministers to be excommunicated, without Notice given to himself, because it might probably fall upon a Person whose Service might be necessary to support him in his new acquired Dominions.

But when once Disputes came to be managed by cunning Civilians and Canonists, then various Cases of Excommunication were brought into the Spiritual Courts, distinct from the ancient Method and Practice, so that the Church hath long groaned under the Intricacies of the *Canon Law*.

Excommunication was then divided into *majorem* & *minorem*; by the one the Party is deprived of the Sacraments, and dying under the Sentence is not to have *Christian Burial*, but then by the (a) Canon he must be denounced to be excommunicated.

By the other he is deprived of the Sacraments and Divine Worship, and this latter Sentence is frequently used for Obstinacy, Disobedience in not appearing upon Citations, or not submitting to the Injunctions of the Court, or for Costs of Suit, Proctors Fees, or for some other small Offences; as for instance, in the (b) Reign of *Edw. 3.* the Bishop of *Hereford* excommunicated every Man who should Hunt in his Woods, Parks, Chaces or Warrens, in *Malverne*, and catch Hares, Conies or Pheasants there; or elsewhere in his Diocess.

This and many more Excommunications for such frivolous Matters made the People insensible of the Danger of such Censures, the Contempt whereof hath gradually encreased for many Ages, insomuch, that the Commissioners in *Edw. 6.* Reign, who were to reform the Ecclesiastical Laws, amongst the rest, thought it proper to reduce Excommunication nearer to its primitive Institution, and therefore they were of Opinion that it never ought to be denounced, but for obstinacy in great Faults, and that the Judge who was to give the Sentence should be assisted by a Justice of the Peace, and the Minister of the Parish where the Offender lived, together with Two or Three more learned Presbyters, in whose presence the Cause was to be examined, and then Sentence might be given, and after-

(a) Canon 68. (b) 2 Rol. Abr. 177.

wards put into Writing, and transmitted to the Minister of the Parish, &c. and to some neighbouring Minister, and then no Person was to Eat or Drink with him, except his own Family, and if they did, being admonished to the contrary, they were also to be excommunicated; and if the Offender continued 40 Days under the Sentence without shewing any Repentance, then the Bishop was to certify it into the Chancery, upon which Certificate the Writ *de Excommunicato Capiendo* was to be issued, and always directed to the Sheriff, by Virtue whereof the Person was to be taken, and committed without Bail, until he Conform; and he could never avoid this Sentence by an Appeal, because the Legality of it is to be determined by an Ecclesiastical Judge.

Afterwards, *Anno 22 Eliz.* it was proposed to a Convocation then assembled at Paul's, that this Church-Censure might be reformed, and that no Persons might be excommunicated, but for great Crimes.

'Tis true, *Contumacy* is a very great Crime, for 'tis a Disobedience to Authority, and in that respect there is no great difference, whether the original Cause is Trivial or not; and therefore it was thought fit, that, instead of Excommunication, some other Punishment should be inflicted upon those who were in Contempt, in disobeying any Process upon a frivolous Occasion; and that was to be fined and committed, if a Layman; and Suspension and Sequestration, if a Clegyman.

But I do not find this proceeded any farther than a Proposal, so there was no Reformation of this Church Censure, but it remains to this Day, as it was then.

Before I shall particularly treat of this Certificate, and the Writ, which is grounded upon it, I must take Notice of another sort of Excommunication invented by the *Canonists*, which is mentioned likewise in our (a) Statutes, and that is an Excommunication *ipso facto*, which is *major Excommunicatio*, for 'tis a Rule amongst them, that *Excommunicatio simpliciter prolata intelligenda est de majori*.

Now, tho' in this Case the Party is both by the Canon and Statute really and in Fact excommunicated, without any formal Sentence, yet such an Excommunication hath no effect at Common Law, without a declaratory Sentence pronounced by an Ecclesiastical Judge.

I grant, that some Sentences of Excommunication have been denounced in Parliament, as against the Infringers of *Magna Charta*, which, though done in a Secular Court, yet is not altogether the Sentence of Laymen; for it might be their Agreement to the Opinions of the Bishops, who were then assembled in Parliament.

So, striking in the Church or Churchyard is Excommunication *ipso facto*, by the Statute of 5 & 6 Edw. 6. but this is not

(a) 5 & 6 Edw. 6. Dyer 275. 1 Vent. 146.

only a Confirmation of many Canons, but tends purely to the Peace of the Church.

Upon the whole Matter, Excommunication is a Punishment which hath been always used in the Church to reform Offenders; 'tis necessary upon the Principles of Natural Reason, for it was practised by the Gentiles who had no other Light to direct them; and though there are not many Instances of this Punishment under the Mosaical Dispensation, it was, because the Government of the Jews was then a *Theocracy*, and the Offenders were punished by God himself.

That under the Gospel-Dispensation our Saviour gave the Power of the Keys to *St. Peter*, that he might admit some and excommunicate others out of the Church; that *St. Peter* executed this censure upon *Simon Magus*, and that *St. Paul* did the like upon *Hymeneus* and *Alexander*, and the incestuous Person at *Corinth*.

That the Apostles vested the primitive Bishops with this Power, which they practised in the first and purest Ages of the Church upon Hereticks, Apostates, and for other grievous Offences, and that whilst the Bishops exercised this Spiritual Jurisdiction only in extraordinary Cases, the People did not only reverence their Persons, but stood in greater awe of the Sentence, by reason of the Authority of him who denounced it.

But when they assumed an exorbitant Power over the Persons and Estates of Men, when they called upon the Civil Magistrate to assist them, which afterwards was the Occasion that the Spiritual and Temporal Courts encroached upon each other in point of Jurisdiction, when the Canonists had invented so many sorts of Excommunication that they made it intricate, and Animosities encreasing amongst different Parties, that they excommunicated one another for Trifles. This was such a Derogation from its primitive Institution, that the Sentence came to be despised by Men of disorderly Principles, and not to carry that awe with it as it did at first:

However, the Church is still vested with this Power, and particularly amongst us; and the Temporal Courts never grant Prohibitions in Cases of Excommunication.

This appears by the Parliament *Anno 9 Ed. 2.* in which it was enacted, That excommunicated Persons should not be replevied by the King's Writ; and by the Statute *Circumspecte agatis* (a) which Prohibits the Temporal Courts to punish the Clergy for inflicting Pennance enjoined by Prelates for Fornication, Adultery, &c. and by the Charter of *Ed. 2.* which declares that Letters shall never be sent to the Ordinary to absolve any Person from Excommunication, but where 'tis against his Prerogative.

(a) 3 Edw. 1.

And tho' our Kings have sometimes sent their Mandatory Writs to Bishops to compel them to revoke Excommunications, yet it was never done, but in Cases where they had abused their Power to the Oppression of the Subject.

I shall now mention something concerning,

1. The effect of Excommunication by our Law.
2. The Nature of the Certificate or *Significavit*.
3. The Writ de *Excommunicato capiendo*.
4. The Writ de *Cautione admittenda*.

1. As to the first of these Particulars 'tis held, that whilst a Person is under this Sentence he cannot commence a Suit at Law, yet he may defend any Action that shall be brought against him, so he may Marry or make a Will.

He may not enter the Church in Time of Divine Service, but he may hear the Word preached. My Lord Coke (b) seems to intimate, that an Excommunication is a greater Disability than an Outlawry, for if a Plaintiff who is an Executor is outlawed, that cannot be pleaded to disable him from proceeding in his Suit, because 'tis the Right of another, but if he is excommunicated, 'tis otherwise, because every Man who converseth with such a Person is excommunicated himself.

But this seems to be a Mistake, for they are not excommunicated till admonished not to converse with him.

So likewise where there are Three Executors (c), and one is excommunicated, and in an Action of Debt brought by them all, the Excommunication of one is pleaded in *Abatement*, this *suspends*, but it doth not *abate* the Action.

But regularly the Plea ought not to be concluded in *Abatement quod petit judicium de Breve* (d), but thus, *viz. petit judicium si respondere debeat*, or thus, *super quod the Defendant petit quod loquela prae'd' remaneat sine die*, because, tho' the Party is excommunicated, yet the Writ is not abated, for he may get Absolution and have a Re-attachment upon the same Original.

Now when an Excommunication is pleaded, the *Significavit* (e) must be set forth *sub pede sigilli*, 'tis the express Text of *Litton* (f), unless the Writ had issued out of the same Court in which the Excommunication was pleaded, and the Reason is, because it may appear that the Person is certainly excommunicated, but 'tis sufficient to alledge that the Party was excommunicated (g) *Et protulit hic in Curia literas Testamentarias Episcopi, & qua notum faciant universis quod scrutatis registeriis, &c.* though this is not so positive as if it had been pleaded under the Seal of the Bishop.

Significavit. 2. As to the *Significavit*. When a Person is excommunicated it must be published in the Church by the

(b) 1 Inst. 134. (c) 3 Lev. 208. (d) Co. Lit. 128. 3 Lev. 134.
(e) 1 Lut. 17, 18. (f) Litt. Sect. 201. (g) 1 Vent. 222.

Minister of that Place where the Party lives, he being required by an Instrument under the Seal of the Court so to do, and if the Offender continueth obstinate under that Sentence for 40 Days, then the Bishop of the Diocess certifies it to the Queen in *Chancery*, which if he refuseth, he may be compelled by the Archbishop of the *Province*, and this is called the *Significavit*.

It must be under the Seal of the Bishop, and not of his Official (*b*), because none can certify this Matter, but the Person to whom the Court may write to absolve; yet in some Places it may be good by Custom under the Seal of the Archdeacon, but then it must appear that the Matter was within his Jurisdiction.

But be it under whose Seal it will, it must express the Cause for which the Person was excommunicated, that it may appear the Ecclesiastical Court had Jurisdiction (*i*); and therefore if it sets forth, it was for not answering Articles, or for certain Causes without mentioning what Causes, 'tis void for incertainty.

The Bishop must set forth, that the Party (*k*) was Resident in his Diocess at the Time of the Excommunication, and the Certificate must shew in what (*l*) Court he was excommunicated.

It must likewise set forth the Day on (*m*) which he was excommunicated, because 'tis traversable: See more of this in *Capias* following.

Excommunicato Capiendo.] The ancient form of the *Capias* *Excommunicat*. was thus:

Rex, &c. *vis Suffex salutem: Significavit nobis venerabilis pater Johannes Ciceſtria Ep'us per literas suas patentes quod Jo. de Parochia de H. *sua Dioces propter suam manifestam contumaciam Auctoritate ipsius Episcopi Ordinaria Excommunicatus est, nec se vult per censuram Ecclesiasticam justiciari, quia vero potestas regia sacrosancta Ecclesia in querelis tuis deesse non debeat tibi, precipimus quod prad' Jo. per corpus suum secundum consuetudinem Angliae sistatur, donec sancta Ecclesia tam de contemptu, quam de injuria ei illata ab eo, fuerit satisfactum, Teste, &c.*

By this Writ it was in a manner left to the Discretion of the Sheriff, whether he should execute it or not, because it was not returnable in any Court which might enforce the Execution, or punish the Officer for a false Return.

Therefore Anno 5 Eliz. cap. 23. it was enacted, that every Writ *de Excommunicato capiendo* shall be awarded out of Chancery in Term Time (*n*), and made returnable in the Queen's

(*b*) 8 Rep. Trollop's Case. (*i*) 1 Roll. Rep. 136. (*k*) Moor 467. (*l*) Moor 775. (*m*) 2 Cro. 82. * *He must have an Addition according to the Statute 1 H. 5. or he shall not incur the Penalties in the Act, 5 Eliz. cap. 23.* (*n*) 2 Cro. 567. Cro. Car. 582.

Bench

Bench the next Term after the *Teste*, there being always to be Twenty Days between the *Teste* and Return.

That after 'tis sealed it must be recorded in *B. R.* for otherwise the Party may be discharged without pleading it (o), then it must be delivered to the Sheriff to execute; which if he neglect to do, the Judge of the Court may amerce him, and estreat it into the Exchequer.

But if the Defendant lives in *Wales*, or in a *County Palatine*, or *Cinque Port*, then this Writ must be sent by *Mittimus* out of the Chancery to the chief Officer of that Place, to proceed and take him.

The Sheriff is bound to return this Writ, and if he makes a false Return, he forfeits 40*l.* to the Party grieved; if he return *Non est inventus*, then a *Capias* issues out of *B. R.* returnable in Term-Time, and there must be at least Two Months between the *Teste* and Return thereof, and a Proclamation must be made either at the County-Court, Assize, or Sessions, Ten Days at least before the Return-Day; that the Defendant should within Six Days after such Proclamation render himself in Custody in Pain of 10*l.* and the Sheriff is to make a Return of this *Capias*.

If upon such Return it appears the Defendant hath not rendered his Body, there shall issue another *Capias* out of *B. R.* with Proclamation as aforesaid; and if, upon the Return thereof, the Defendant doth not come in, the Penalty is 20*l.* and so a *Pluries Capias* with Proclamation, &c. and like Penalty of 20*l.* and so infinitely with the same Penalty, until he render himself to Prison.

All this is required by that Statute, and likewise that the excommunicated Person hath an Addition in the Writ of his Quality, and Place of Abode; but if 'tis with a *Nuper* of such a Place, then the first *Capias* with Proclamation shall be, that the *Significavit* shall contain, without a Penalty, that the Defendant was excommunicated for some of these Causes following, *viz.*

1. For Heresy.
2. Refusing to have his Child baptized (p).
3. To receive the Sacrament.
4. To come to Divine Service.
5. For Error in Matters of Religion or Doctrine.
6. For Incontinency.
7. Usury.
8. Simony.
9. Perjury in the Ecclesiastical Court.
10. And Idolatry.

(o) 1 Vent. 338. (p) 1 Rol. Rep. 174.

If none of these Causes is contained in the *Significavit*, the Defendant shall not incur the Penalties beforementioned, neither if he is in Prison, beyond Sea, an Infant of *Non sane* Memory, or Covert, or if he is proclaimed in a County where he is not for the most part Resident.

And if a *Capias* with Penalties should issue against him, when there are none of these Causes in the *Significavit*, the Court will grant a *Supersedeas* upon a Motion; but if he should be taken, then he cannot be discharged without pleading it, I mean from the Penalties; for tho' he doth plead it, he cannot be discharged from his * Imprisonment by such Plea, until Absolution. *Shore* 17.

But the Plaintiff ought to take Care in suing forth a *Capias*, with a Penalty, where none of these Causes are mention'd in the Certificate (*q*), for if he doth, the Defendant may have an Attachment against him, because he is oppressed thereby, and put to Expences in pleading it.

But this Statute doth not take away an *Excommunicato Capiendo* at Common Law, but only enforces a Defendant excommunicated for one of those Causes to render himself under Pain of these Forfeitures; for a Man may be excommunicated (*r*) for several other Matters besides those mentioned in the Statute, and 'tis the usual Practice so to do; but then the Process must be without Penalties, and if the Defendant doth not render himself into Custody, the Court of Queen's-Bench may award such Process *In Infinitum*, till he doth or is taken.

The Mother was † excommunicated for not contributing towards the Repairs of the Church in *Deeping* of *Lincolnshire*, the Son in Consideration that the Bishop would *absolve* his Mother at his Request, promised to pay the Tax to the Churchwardens, who brought an Action against the Son for the Money, and had a Verdict; and tho' it was objected that there was no *Consideration* to raise the Promise to the Plaintiffs, for the Absolution was not made at their Requests, but at the Instance of the Defendant; yet since the Mother had a Benefit by it, the Court presumed the Bishop would not have absolved her, but upon a Promise made to pay the Tax to the Churchwardens.

Cautione Admittenda.] 4. The Laws of *England* take particular Care of the Liberties of the People, as in all other Matters, so in this of Excommunication; for if one excommunicated is in Custody, and offers sufficient Caution to the Bishop to obey the Commands of the Church, and he refuses to take such Caution, and to certify it to the Sheriff, that the Defendant may be discharged, he may have a Writ (*f*) *De*

* Cro. Car. 196. 2 Jones 226. 2 Jones 89. 3 Mod. 43. 29. Latch. 174. Contra. and 1 Bullst. 122. (*q*) Latch. 174. (*r*) Sid. 181. † 2 Lev. 119. 1 Vent. 297. (*f*) F. N. B. fol. 63.

Cautione Admittenda directed to the Bishop, commanding him to do it.

If the Bishop should still refuse after this Writ is served upon him, the Defendant may have another Writ directed to the Sheriff, to warn the Bishop in Person to take Caution, and if he still refuseth after such Warning, the Sheriff himself may discharge the Defendant.

But if the Bishop is apprehensive that the Defendant will be discharged by the Sheriff, then he may sue forth a Writ directed to him, reciting the whole Matter, at the End of which Writ there is this Clause, *viz. Tibi præcipimus quod ipsum Jo. a Prisona præd' nisi in Præsentia tua cautione Pignoratica ad minus eadem Ep'o de satisfaciend' obtuleris nullatenus deliberes absque Mandato nostro seu ipsius Episcopi in hac Parte speciali, Teste, &c.*

This *Cautio Pignoratica* is one of those Cautions allowed by the Canonists where there are Three in all.

1. *Furatory*, and that is where the Party makes Oath he will obey the Sentence in small Offences, and that he is not able to give any other Security.

2. *Fidejussory*, and that is by giving Bond with Sureties; but it hath been a Question in whose Name the Bond ought to be taken, Whether in the Name of the Queen or the Bishop? 'Tis usually taken in the Name of the Bishop (1); but it was objected that it ought not to be so, because, if the Bishop should die, the Penalty would go to his Executor, therefore it ought to be in the Name of the Queen, who is by Law entitled to it.

3. *Pignoratica*, and that is by laying down Money or Goods as a Pledge.

But if the Defendant, without any Caution, freely offers to obey the Sentence, and the Bishop refuseth to accept it, and to absolve him, an Action on the Case lies against him, or he may be indicted for it, and the Reason is, because the Party is damaged whilst he continues under the Sentence which he is willing to perform, because all that Time he is disabled to sue, or to have any Remedy for an Injury done to him.

Lastly, An Action on the Case will lie for maliciously Impleading, or causing another to be excommunicated in the Ecclesiastical Court; for tho', in an Action between Party and Party in that Court, if the Matter go for the Defendant, he shall not have an Action on the Case, because in such Case he will have the Costs; yet where there is a Citation *Ex Officio*, and 'tis prosecuted maliciously, without Cause, so that the Party is excommunicated, and taken upon the *Capias*, and committed till absolved; in such Case he shall have an Action, for in such Suit he can have no Costs, 1 Vent. 86.

Exemption. See Monks. *Composition Real.*

(1) 1 Bulst. 122. 2 Lev. 36. Raim. 225.

First-Fruits. See Annats. Farmes. See Clergy.

SINCE there is an Order of Men set apart to attend the Service of God, 'tis necessary they should have a sufficient Maintenance to subsist; that so they might not be diverted from religious Duties, in seeking a Livelihood by such Profits which may arise by Bargains and Contract, or any other secular Advantages.

Therefore by the Statute 21 H. 8. cap. 13. Spiritual Persons are prohibited to farm any Lands, either by themselves, or by any other to their Use, upon Pain to forfeit 10 l. per Month, One Moiety to the King, the other to the Informer; neither shall they buy and sell again for Profit any Cattel, Victuals or Merchandize, upon Pain to forfeit treble the Value, to be divided as aforesaid.

But if they have not sufficient *Glebe* or *Demefne* Lands in Right of the Church, they may farm Lands for the Maintenance of their Families, and buy Cattel to stock the same.

This Act was made to encrease Devotion, and that the Clergy might not employ themselves in the ordinary Affairs of Life, but be intent upon Devotion, by which Means they were in all Likelihood to be more respected by the Laity; and they have been so conformable to this Law since the Reformation, that we read of no Prosecutions against them upon this Account.

'Tis true, about Six Years after the making this Statute there was an Action of Debt brought against a Vicar, for farming Land *Contra formam Statuti*, &c.

The Defendant pleaded *Non habuit vel tenuit Terras ad Firmam contra formam Statuti*, and it was held, that he might give in Evidence that he took Lands for the Maintenance of his Family.

Glebe.

THIS is the Land which the Parson or Vicar hath in Right of the Church; and, that there may be a perpetual Memory thereof, 'tis required by the Canon, that the Bishops procure a *Terrier* * to be taken of such Lands by the View of honest Men within every Parish of their respective Diocess, by the Appointment of the Bishop himself, whereof the Minister is to be one, and this is to be laid up in his Registry.

As long as the Parson keeps the *Glebe* in his own Hands he pays no Tythes to the Vicar, tho' he is endowed of all the small Tythes in the Parish; but it hath been held, that, if he Demise the *Glebe* to a Layman, the Tenant must pay the small Tythes to the Vicar, and the great Tythes to the Lessor.

* Canon 87.

So likewise where the Vicar Leases his Glebe, the Tenant must pay the great Tythes to the Parson or Impropiator, and the small Tythes to the Vicar ; but this must be understood where the Land was Tythable at the Endowment ; for, if it was appropriated to a Priory before the Vicaridge was endowed, then, tho' the Endowment was *De minutis decimis* of the whole Parish, the Vicar shall not have the Tythes of the Glebe there, tho' he had leased the same, because it was not Tythable at the Time of the Endowment.

'Tis true, if Tythes have once been paid out of Glebe, demised by a Parson or an Impropiator, it ought to be so as often as 'tis demised ; but where such Tythes are demanded, if they were never paid, then either of them may prescribe, that he and all his Predecessors (u) have enjoyed the Glebe Land by themselves, and by their Tenants discharged of Tythes to the Vicar ; and such a Suggestion shall be a sufficient Ground for a Prohibition, and the rather, because small Tythes out of Glebe Land demised by an Impropiator are not payable *De communi jure* to the Vicar, because *Ecclesia non debet decimari Ecclesia*.

But if a Parson, where there is no Vicar (x), leases his Glebe, 'tis otherwise, especially if he reserve but a small Rent, for in such Case the Lessee shall pay Tythes of the Glebe to the Parson himself.

Before the Statute 14 Ed. 3. cap. 17. a Vicar had no Manner of Freehold in the Glebe, and therefore he could not have the Writ of *Juris utrum* to recover what had been alienated by his Predecessor, which Writ is given to the Vicar by that Statute.

It hath been said, that, during an Avoidance (y), the Fee-simple of the Glebe is not in the Patron, but in Abeyance, that is, 'tis only in Expectation, and not in any certain Person ; and this was Littleton's Opinion ; the Reason which he gives why it ought to be so, is, because it should not be subject to any Alienation or Discontinuance, which might be made by the Possessor, so as to Bar the Successor ; for, since the Parson hath *Curam Animarum*, the Law takes Care for him that he should not be destitute of that Maintenance which arises from the Glebe.

'Tis true, the Year-Book 8 H. 6. 24. is cited to prove it, but Serjeant Paston argued there could not be an Estate for Life, unless there was also a Reversion Expectant upon such Estate, which must be in some Body ; and Sir William Babington, who was then Chief Justice of the Common Pleas, was of Opinion, that upon an Avoidance the Fee-simple doth rightfully belong to the Patron.

(u) 2 Lut. 1062. Cro. Eliz. 479. More 437. 2 Rol. Abr. 335. (x) Owen. 39. 1 Leon. 300. Cro. Eliz. 161. Noy. 35. (y) 2 Rol. Abr. 339.

Fitzherbert (2) says, 'tis in the Patron and Ordinary; and long before he wrote it was held, that they might charge it before the Church was full (a).

But after Induction the Freehold (b) is in the Parson; and tho' he cannot commit Waste; yet he may dig for Lead Ore, and shall not be prohibited.

Neither shall he be charged for his Glebe to send out either Horse or Man to the *Militia*, because 'tis a Spiritual Revenue; and held *In pura & perpetua Eleemosyna*.

Lastly, If a Parson or (c) Vicar sows his Glebe, and then demises it, and doth not lease the Tythes with the Land; or if he sell the Corn, and the Vendee cuts it, yet he must pay the Tythes to the Parson, &c.

So if the Parson should die before the Corn is cut, his Executor shall have it; but if another is inducted, the Executor of the dead Man (d) must pay the Tythes of the Glebe to him; but 'tis otherwise, if the Corn was cut in the Life-time of the former Incumbent, for in such Case the Executor pays no Tythes.

But if a Parson leases his Tythes, reserving the Glebe, and then sows it, he shall pay Tythes to the Lessee.

That the Executor of the last Incumbent shall have the Corn sowed on the Glebe, appears by the Statute 28 H. 8. cap. ii. which gives Power to such Incumbent to devise the same; and by the same Act 'tis provided that the Successor shall have the Parsonage-House and the Glebe, not sown upon a Month's Warning.

Guardian. See Courts Ecclesiastical.

Guardian of the Spiritualties.

THIS is that Person or Persons, in whom the Ecclesiastical Jurisdiction of any Diocese resides, after the Death or Translation of a Bishop, or whilst he is beyond Sea in any Publick Employment for the Church or State; and if such Person should be an Archbishop, then the Dean and Chapter are Guardians, &c. If a Bishop, then the Archdeacon of the Province is Guardian of the Spiritualties, and he may commit this Jurisdiction to what Persons he thinks fit.

But this was denied by my Lord Coke, in the Case of *Grange and Denny* (e), in which Case there was a Dialogue between him and Justice *Doderidge* concerning this Matter; the one affirming, that at Common Law the Dean and Chapter, *Sede Vacante* of the Bishop, are Guardians of the Spiritualties, but

(2) F. N. B. 49. b. (a) Fitz. Abr. Tit. Annuity 53. 5 Rep. 81. b. (b) Sid. 152. (c) 1 Rol. Abr. 655. Plito 1. (d) 2 Bulst. 184. (e) 3 Bulst. 101. 1 Rol. Rep. 363.

that the Archbishops have it by Way of Composition, and he insinuates that this was an Usurpation ; for in the same Page he tells us, that great Lords will encroach on all to get what they can in their own Hands.

Now, the Year-Book (*f*), which he there Cites, proves no such Thing ; for *Norp*, who was the King's Sejeant, says positively, that the Archbishops are Guardians of the Spiritualties, of common Right, and that so was the Custom throughout the Realm at that very Time ; and this was not denied by *Pool*, tho' he was of a contrary Opinion as to the Right ; for he held that to be in the *Dean and Chapter*, unless where it was in the Archbishop by Prescription or Composition ; so that it must be a mere Imagination of my Lord *Coke*, and without any Ground for such an Opinion ; that Archbishops are Guardians of the Spiritualties by Composition.

Therefore, where any Question arises, during the Vacancy of a Bishoprick, who shall be Guardian of the Spiritualties ; the *Archbishop* always prescribes to it as his Right, so did the * *Archbishop of York*, during the Vacancy of *Durham*, who was opposed by the *Dean and Chapter* ; in which Case my Lord *Hales* was of Opinion, that the Right may be in the *Dean and Chapter*, by Custom and Usage, as to *Jurisdiction*, but that they ought to call a neighbouring Bishop to assist them in *Ordination* ; and tho' it was plainly proved in that Case, that the *Archbishops of York* did in former Times exercise Jurisdiction, as Guardians of the Spiritualties *Sede vacante Durham*, yet they having for a long Time disused the same, and the *Dean and Chapter* administering that Jurisdiction ever since *H. 8.* the Right was adjudged to be in them.

'Tis true, there are some Deans and Chapters who claim this Jurisdiction by Virtue of some ancient Grants from the Kings of *England* ; but 'tis a Jurisdiction which always ceases upon the Consecration of a new Bishop to the vacant See.

But before the new Bishop is consecrated, they have Power to accept Presentations, and to give (*g*) Admissions and Institutions to Benefices, within the Diocese ; and by the Statute 25 *H. 8. cap. 21.* they may grant Licenses, Dispensations, Faculties and Rescripts, in Cases of Appeal, as the Archbishop might have done if living. And by the Statute 13 *Eliz. cap. 12.* a Minister, during the Vacancy of the See, may declare his Assent and Consent, and subscribe the Articles of Religion before the Guardians of the Spiritualties, and they have Power to certify it under their Seal.

Now, if it should happen, that they should refuse to grant such Dispensations, where by Law they may and ought to do it, then upon a Petition to the Lord Chancellor, by the Party

(*f*) 17 Ed. 3. fo. 25.
223.

* 1 Vent. 225.

(*g*) 2 Rol. Abr.

grieved, he may issue out a Writ, requiring them under a Penalty to grant the same; which Writ begins thus,

Anna, &c. Venerabilibus & Egregiis Viris dominis Decano & Capitulo Ecclesiæ Cathedralis, & Metropolit' Sancti Petri Eboracen' ad quos omnis & omnimoda Jurisdictio Spiritual' & Ecclesiastica quæ ad Archiep'um Eboracen' plena sede pertinet, ipsa sede jam vacante notoriè dignoscitur pertinere, salutem, &c.

And, if notwithstanding such Writ, they still refuse, without shewing any reasonable Cause, then the said Penalty is forfeited to the Queen; and the Lord Chancellor issues out another Writ, directed to Two Bishops, or to some other Spiritual Persons, as shall be thought fit to do what the Guardians of the Spiritualties refused.

Heresy.

THIS is an Opinion contrary to the true Doctrine of the Christian Faith, and obstinately maintained by such who profess the Name of Christ.

Under this Title, I shall only shew what the Law was formerly, as to the Punishment of an Heretick, and how it stands at this Day.

Before the Statute 2 Hen. 4. a Bishop could not commit any Person for Heresy: The Proceedings against him were by the Censures of the Church, in order to Conviction; that is, the (b) Archbishop might convict him in a Provincial Convocation; and then he was to be delivered to the Sheriff, who, by Virtue of the King's Writ *De Hæretico Comburendo*, was to burn him.

But it being found troublesome to summon a Convocation upon this Occasion, that Statute provided that every Bishop might, in his Diocese, convict an Heretick; and if this was done in the Presence of the Sheriff, (which was usual in those Days) for the Bishop would send for him on Purpose, then, immediately upon the Conviction, he was delivered to the Sheriff, who burnt him, without the Writ *De Hæretico Comburendo*; but if it happened (as sometimes it did) that the Sheriff was not present at the Conviction, or if the Heretick was ordered to be burnt in a County, other than where he was convicted, in such Cases the Sheriff could not burn him without the Writ, &c.

I do not find, that a Heretick convicted had any Way to save himself from the Fire, but by abjuring his Opinion, and this was only upon the first Conviction; for if he relapsed, and was convicted the second Time, then he was certainly burnt.

And this was William Sawtree's Case, who, Anno 2 H. 4. was condemned by Archbishop Arundel in a Provincial Council, for a relapsed Heretick; and a Writ was directed to the Mayor and Sheriffs of London to burn him; and this was by the Advice of

(b) Bro: Abr: Tit: Heresy:

the (i) Lords Temporal in Parliament assembled, and it was subscribed *per ipsum Regem & Concilium*.

This was the first Person who was burnt in England for Heresy, upon a Sentence given in a Council, and by Virtue of the Writ *de Haretico comburendo*. 'Tis printed in (k) *Fitzherbert*; and Burning is there called the usual Punishment, which must relate to the Usage beyond Sea, for it was seldom or never used here, tho' I admit Burning was the Punishment at Common Law for this Crime; but then the Proceedings against the Offender were in the Temporal Courts upon Indictment, &c.

But in the Primitive Church, this, or any other capital Punishment for Heresy was condemned; and we are told by *Sulpitius Severus*, that when Two Bishops prosecuted the Heretick *Priscillian* to Death, they were so far censured for the Barbarity of the Act, that many refused to hold Communion with them.

But Father *Mainbourg* held that this Severity might be justly inflicted on them; for tho' the Church admits of no bloody Executions, but is contented with the Mildness of those Judgments which the Bishops exercise, pursuant to the Canons; yet 'tis supported by such severe Constitutions of Princes, because the fear of Death doth often make Hereticks apply themselves to some Spiritual Remedies to cure their Errors by a sincere Conversion.

Our King *James* was of the same Opinion, who wrote to the States, that if *Voeftius* was convicted of Heresy he ought to be burnt: 'Tis true, that long before that Time St. *Augustine* approved Penal Laws for Punishment of Hereticks, but those Laws did not extend to Death, for *Priscillian*, as above-mentioned, was the first who was executed for Heresy; 'tis true, the Sentence against him was grounded upon a secular Constitution, and not upon the Laws of the Church, which were against all manner of bloody Executions, among themselves; but yet the Clergy approved such Executions when they were inflicted by the Laity for Ecclesiastical Offences, though they seemed to be always against them; for they required Princes to make Laws against Hereticks, and commended the capital Punishments which were enjoined in such Cases; and yet when they delivered Hereticks to the Magistrates, in order to be Executed, it was with a Protestation that they earnestly wished for their Amendment, and that they did not desire the Criminal should be punished with Death, but rather that he should find Mercy and live, when they knew he must certainly die; but to colour their Hypocrisy, they left it to the Magistrate to act according to the Laws for the good of the Church and State.

(i) 2 Rol. Abr. 226. (k) Anno 5 R. 2.

The first Instance that we find of Burning was by *Justinian* II. in the Eighth Century, who burnt all the *Manichees* in *Armenia*. But *Anno* 1198. about the beginning of the Thirteenth Century, the *Albigenses* in the South Parts of *France*, preaching against the Corruptions of the Popish Clergy, were for that Reason reputed Hereticks; and *St. Dominick* came out of *Spain* to convince them of their Errors, but without any effect, and therefore he persuaded the Magistrates to burn them.

But as yet there was no Law for it, therefore by the Fourth *Lateran* Council it was decreed, that Hereticks should be delivered to the Magistrates to be Extirpated, which is a very soft word for Burning, and if they neglected then they were to be Excommunicated. Princes were also deposed by the Pope, and their Subjects absolved from their Allegiance; and this was so terrible to them, that they chose to deliver up their Subjects to this Death.

In *Wickliffe's* Time (1) a Bill passed the House of Lords, but it was never sent to the Commons; that, upon a Certificate, made by the Bishop to the Court of Chancery, of the Names of such of *Wickliffe's* Followers who preached without License, and drew great Assemblies together, the Chancellor should issue out Writs to the Sheriff to apprehend and commit them, there to remain till they justify themselves according to the Laws of the Church.

But in the next Parliament, the Commons by (m) a Bill declared, that they never assented to that Act, and therefore desired that it might be taken as void.

My (n) Lord *Coke* tells us, that it was usual in those Days to engross all Acts of Parliament in Parchment, and to transmit them under the Great-Seal to the respective Sheriff of every County, in order to be proclaimed there; that this Act 5 R. 2. tho' it was only an Ordinance of the King and Lords, and not an Act of Parliament, for want of the Concurrence of the Commons, was engrossed, and sent to the Sheriffs to be proclaimed; but that the Act 6 R. 2. by which that Ordinance was declared to be void, was never engrossed; it was then, and ever since kept back, as my Lord *Coke* says, by the Prelates; and the Ordinance hath been continually printed in our Statute-Books, which must be very extraordinary, because no succeeding Parliament hath taken Notice of this supposed Act.

But when R. 2. was deposed, then in gratitude to those Clergy who assisted *Hen. 4. cap. 15.* in his Usurpation; he got a Law to be passed in both Houses, to which he willingly gave his Assent; the Purport whereof was, that none should preach without License, nor deliver any Doctrine contrary to the Determination of the Holy Church; and if any Person was suspected of doing to the contrary, then he was to be committed by

(1) F. N. B. 269. (m) 6 R. 2. (n) 3 Inst. 41.

the Ordinary, till he was either convicted, or abjured his Opinion; and if he refused, or did relapse after Abjuration, then he was to be delivered to the Civil Magistrate to be Burnt; but first his Conviction was to be certified into the Chancery, upon which a Writ issued out to Burn him.

But *Anno 25 Hen. 8. cap. 14.* one *Phillips* having complained to the Commons of his intolerable Usage by the Bishop of *London*, who had committed him only upon suspicion of Heresy without any manner of Proof; and this Complaint being sent up to the Lords, and they not regarding it, the Commons sent up a Bill, which in effect was a Repeal of that Statute 2 *Hen. 4.* setting forth, that as yet there was no Declaration what should be Heresy, but only in these general words, *viz. That it was an Opinion contrary to Scripture or Canonical Sanctions*; then they shew that the Proceedings in this Case were without Presentment, therefore it was provided that Hereticks should be prosecuted by Presentment, and by the Accusation of Two Witnesses; and then, and not before, the Person thus accused should be committed, but not without Bail, and if convicted, should be Burnt, but not without the Writ *de Haretico comburendo*; and that none should be prosecuted upon any Canon Law, for speaking or doing any thing against it,

But now, by the Act 1 *Edw. 6. cap. 12.* both these Statutes are repealed; and there is a (a) Statute Law in force against Hereticks, so that the Proceedings against them must be by the Censures of the Church only. By the Act 23 *Hen. 8. cap. 9.* 'tis provided, that Archbishops may cite for Heresy in any Diocese within their Provinces, the Bishop of such Diocese consenting, but if he refuse, then to Proceed against the Heretick.

And it was very necessary that those Statutes should be Repealed, because, when Bishops had Power to commit Men upon suspicion of Heresy, they did exercise that Power in a very extraordinary manner; as for instance, an Executor was Excommunicated at the Suit of a Widow, for denying her the Third Part of her Husband's Goods, But in another place (b) my Lord *Coke* tells us it was for not paying a Legacy; and being under the Sentence, the Man declared that he did not fear it, for that he was not Excommunicated before God, because he had as good a Crop of Corn as any of his Neighbours; for these words he was committed by Archbishop *Bourchier* to *Maidstone* Goal, as one *non immerito de Haresi suspectum*, but the Prisoner was discharged upon a *Habeas Corpus*, by the Court of *King's Bench*; and Sir *John Markham* the Chief Justice declared the Opinion of that Court, that it was not Heresy against the Determination of Holy Church; and so not within the words or meaning of the Statute.

(a) 3 Inst. 40. (b) 3 Inst. 42. *Keyser's Case*,

'Tis certain, that capital Punishments may deter Men from propagating *Heresies*; and this may be the Reason why *Calvin* was so zealous with the Magistrates of *Geneva* to burn *Servetus*, who about the beginning of the Reformation revived the *Arrian* Heresy, by denying the Godhead of our Saviour: This Punishment did frighten *Gemilis* and *Blandrata* from *Geneva*, who were both guilty of the same *Heresy*; for which the One was afterwards beheaded in *Switzerland*, but the Other was strangled in his Sleep by his Nephew.

Not long after the Execution of *Servetus*, there was one *Castalio* who wrote against it; and *Beza* answered him in a Treatise which he called, *De Hæreticis a Magistratu puniendis*, wherein he maintains that the Magistrate may punish Hereticks with Death.

This Doctrine hath since been compared to the Invention of Bombs, which are of great advantage to those who first use them, especially if at the same Time they are the strongest Party; but if they should afterwards happen to be the weakest, then they are destroyed by their own Invention.

Thus, tho' it might be a present Advantage to a prevailing Party to assert the Right of Magistrates to punish Hereticks with Death, yet if that Side should afterwards become weak, and the other should prevail, they might maintain the same Right in their Magistrates to punish some of the weakest Side for Hereticks, especially since it was in the Power of the strongest Party to declare what *Heresy* is.

And this may be a Reason why the Parliament 1 *Elizabeth*. enacted that nothing should be *Heresy*, but that which had been so adjudged by the Canonical Scriptures, and by the first Four general Councils, or by any other general Council, wherein the same was declared *Heresy*, by the express and plain words of Canonical Scripture, or such which shall hereafter be determined to be *Heresy* by the Parliament, with the Assent of the Clergy in Convocation.

The Offender in this Nature, though convicted, incurs no Forfeiture of his Temporal Estate, because the Proceedings against him are *pro Salute animæ*.

The Punishment by Death was *Anno 29 Car. 2. cap. 9.* thought to be too severe, and therefore the Writ *de Hæretico comburendo* was taken away, and *Heresy* is made punishable by the Queen's Ecclesiastical Laws, either by Excommunication, Deprivation, Degradation, and other Censures, but not extending to Death.

And this was the Opinion of Mr. *Jurieu*, who, in his Apology for the Reformation, affirms that Hereticks were not to be punished with Death; and amongst other Reasons he alleges the Temper of our Saviour towards the *Sadducees*, for he dwelt with them with great Clemency, and did not blame the Magistrates for tolerating them.

Holidays.

UNDER this Title, I shall shew the Practice of the *Jewish* Church, the Custom of the *Heathens*, and the Usage of the *Christians*, under the Gospel-Dispensation, to observe certain Festival Days in the Year; and lastly, in what manner they are enjoined to be observed in our Law: And,

First, As to the *Jewish* Church, 'tis plain they had a Power, and did actually appoint such Days to be observed, in order to magnify the Name of the Lord, and to give Thanks unto him, and to rejoice for his Blessings.

Thus the Feast of the Dedication, both of the * Temple and the Altar, the Feast of the Tabernacles and Trumpets, are expressly mentioned in the Scripture; and many more are to be found in (a) *Sigonium*; but I shall instance in one more out of the Scripture, viz. Fifty Days after the Celebration of the *Passover* the Lord descended upon Mount *Sinai*, at the Promulgation of the Law, and that Day was always commemorated in a peculiar manner by the *Jews*.

Secondly, As for the *Heathens*, who were guided only by the Light of Natural Reason, they observed some Days in the Year with distinguished Solemnities; and these were such in which they had received any extraordinary Benefits, and some to commemorate the Renown of their Brave and Heroick Ancestors.

Thus the *Romans* had their *dies natales* in great esteem, and the *Christians* in imitation of them (for certainly they were to be imitated in many good Things) did, on certain Days, commemorate the Lives and Deaths of the Apostles, Evangelists, and Saints; and not only so, but that by this means they might imitate them in all Godliness and Works of Piety.

Thirdly, This was an ancient Custom in the *Christian* Church, for the Apostles themselves appointed the First Day of the Week to be observed in a solemn manner, in remembrance of the Resurrection of our Saviour; and since such transcendent Mercies were derived to us by his Birth, Crucifixion, Resurrection and Ascension, we ought not only to acknowledge the same every day of our Lives, but in a more peculiar manner upon certain Days appointed for that purpose by the Church.

And it was very early that the Feast of *Easter* was kept, as † *St. Austin* tells us, *Ex Autoritate Scripturae & Universae Ecclesiae*; and so long also as in the Second Century there was a Contention in the Churches of the *East* and *West*, concerning the very Day on which it should be celebrated.

* 6 Ezra. 16. 1 Mac. 4. 59. (a) *De Republica Hebr. Lib. 3.*
cap. 16. † Epist. 19. cap. 14.

So for our *Whitsuntide*; as the *Jews* observed that Day on which the Lord descended on Mount *Sinai*, as before-mentioned, which was Fifty Days after their *Passover*, so we celebrate the Feast of *Pentecost*, because the Spirit of the same God descended upon the Apostles on that Day, being Fifty Days after our *Easter*.

The next was *Christmas*; and tho' the Ancients disagreed about the Time of our Saviour's Birth, yet they set apart one Day in the Year to commemorate his Nativity; they likewise kept the Feast of the *Epiphany*: And we are told by *Clemens Alexandrinus*, who lived about the beginning of the Third Century, that the ancient Christians kept no other Feasts, for they did not call the Apostles Saints, but plain *Matthew, Mark, &c.* 'Tis true, they celebrated the Anniversary of their own Martyrs, by meeting yearly at their Tombs, and there they praised their Actions, and exhorted one another to imitate them in suffering for the sake of their Redeemer.

Afterwards there were many Days observed by the *Christians*, which were spent in Acts of Piety, in Charity, and other Religious Exercises, but not in Revelling and Drunkenness.

And certainly the *Christian* Church hath as great a Power to institute these Festivals as the *Jewish* Synagogue had; for the Reason of such Institution is full the same, *viz.* to praise the Lord in a more peculiar manner for his Mercies, and for those Examples of the blessed Saints and Martyrs, which he hath set before us for our Imitation.

I know 'tis objected, that the *Jews* were directed in this Matter, by the immediate Appointment of God himself, that they might more truly perform the Services due to him; but if the Church appoints nothing which is either against the Scripture, or condemn'd by it, if it doth not make the word of no effect by vain and Superstitious Traditions, as * *Jeroboam* did, by instituting a new Paschal Feast to be observed at another Time and Place than where God has appointed it; then, tho' no such Divine Direction was given to the Christian Church for the Observance of such Days, that Church hath Power to appoint and enjoin the Observance of Festival Days, for the Reasons already mentioned.

Besides, the appointing such Days to be observed is no more than the Appointment of some sacred Actions to be performed at those Times, by which the Days are sanctified, and not the Service by the Days; and in that respect the sacred Ceremonies may be called Circumstantial, and subservient to that Worship which is by Divine Institution.

* 1 Kings xii. 31.

About the beginning of the Reformation there were great Contests abroad concerning Holidays; for *Beza*, in his Life of *Calvin*, tells us that the Church of *Geneva* abolished all Festivals, except Sundays; but that the Canton of *Bern*, at a Synod held at *Lausan*, established them again, to which *Calvin* would never agree.

And if those, who are so peevish with our Church, for instituting particular Prayers on such Days, would but consider how natural 'tis for us in our civil Concerns to commemorate those Days, in which we were delivered by any unexpected Means from Temporal Evils and Losses, or in which we received any extraordinary Advantages, or Blessings relating to our Fortunes or Promotions here, they would not be so angry at our observing those Days in a more solemn manner, in which we were delivered from eternal Death, and made capable of inheriting everlasting Glory.

Therefore, since we are more apt to be led by Imitation and Instruction, the Church has thought fit to set apart certain Days to commemorate the Births, Holy Lives and Deaths of those Saints and Martyrs, who had suffered for the *Christian* Religion; and these we call Holidays, and as such they are enjoined to be observed, not only by the ancient † Canons, but by those of our Church, by which all Persons are to celebrate and keep the Lord's-Day, and all other Holidays, according to the Rules and Orders of the Church of *England*, prescribed in that behalf, viz. in hearing the Word read and taught, in publick and in private Prayers, in acknowledging their Sins, &c. But there is no Rule given as to Abstinence from bodily Labour.

And by another * Canon, the *Common-Prayer* is appointed to be read on such Days as are to be kept Holy; and the Minister is likewise enjoined to declare to the People every Sunday, whether there are any Holidays or Fasting Days in the Week following; and if he neglect so to do, and is admonished by the Ordinary, and shall neglect a second Time, he shall incur the Censures of the Law.

The Scripture hath not determined the Number of Holidays, this is left to the Church; therefore, in a Synod, held at *Oxon*, Anno 1222. Holidays were divided into Three sorts.

1. Into those which were to be observed with all manner of Reverence, and such were all Sundays.
2. Into those wherein all manner of Servile Works of inferior Nature were to be refrained.
3. Into those wherein any Business might be done, after Mass was performed, and not before.

And that the People might know what Days are to be kept Holy, they are particularly mentioned in the Statute 5 & 6 Ed.

† Can. 13. * Can. 14.

6. cap. 3. and those, and no other are ordered by that Statute to be observed, which are as follow :

All-Saints, Andrew, Annunciation, Ascension, Barnaby, Bartholomew, Circumcision, Epiphany, Easter-Monday and Tuesday, James, Great and Lefs, Innocents, John Baptist, John Evangelist, Luke, Mark, Matthew, Matthias, Michael, Nativity of Christ, St. Paul's Conversion, St. Peter, Philip and Jacob, Purification, Sundays, Simon and Jude, St. Stephen, St. Thomas, Whitsun-Monday and Tuesday.

The Statute before-mentioned tells us, that those Days are not to be accounted Holy in their own Nature, but because of Holy Duties to be performed, and that they are not Dedicated to any Saint in particular, but only to God, in remembrance of a Saint ; and this may be sufficient to remove those superstitious Opinions which some Men have, relating to the Observance of them.

This Act was repealed by an Act 1 M. cap. 2. but that was repealed by another, Anno 1 Jac. cap. 15. and from hence a Question hath arisen, Whether that Statute 5 & 6 Ed. 6. is now in force, because 'tis not revived by *Special Words*?

'Tis a Question which is answered by my Lord *Coke, viz. that where a Statute which repeals another is repealed it self, it makes the first Act which was repealed still in force.

But admitting the Law should be otherwise, yet since the *Kalendar* prefixed to the Book of *Common-Prayer* mentions all those *Holidays*, and directs that they should be observed in the Church of England ; and since that very † *Kalendar* is established by the Act of Uniformity, 'tis therefore part of the Law of the Land : And it was the Opinion of that Parliament in which that Act passed, that those, who absent themselves from their Parish-Church where *Common-Prayer* and *Preaching* is used on those Days, do schismatically abstain from the same.

Besides, the Statute 1 Eliz. is declared by this Act to be in full force, and there the *Liturgy* is established.

Now by the one, every Parishioner is enjoined to resort to his Parish-Church on *Holidays*, under the Penalty of the Censures of the Church, and 12 d. for every Offence ; and by the other, there are *Collects*, *Epistles*, and *Gospels* appointed to be read on each *Holiday*.

'Tis plain, that the Clergy and People are not very strict in observing these Days, and there are no other Penal Laws to enforce so necessary a Duty ; but the Ministers may be compelled to it by their Diocesans, for they have the same Power to oblige them to this Duty, as they have to make them observe the Sabbath.

'Tis true, there is a Proviso in the Statute of Ed. 6. that Labourers and Fishermen may (upon occasion) work on these Days, either in or out of Harveft ; and 'tis certain, that thi,

* 2 Inst, 686, † Car 2. cap. 4.

Liberty is carried farther than at first intended, and in a manner to the total Prophanation of all Days set apart for Religious Worship.

And though some Persons through an immoderate Desire of Profit, and some for Pleasure, have neglected to come to Church on these appointed Days, yet if the Clergy would constantly attend the publick Service, this might in Time stir up the People by their good Example to the Religious Observance of *Holidays*.

Lastly, Those which I have mentioned are the stated *Holidays* of the Church, but there are some other Days which are to be observed by particular Acts of Parliament, as the Fifth of *November* (a), which is a Day of Thanksgiving for the Discovery of the Gunpowder Treason.

The Twenty Ninth Day of *May* (b), as an Anniversary for restoring the Royal Family; both these Statutes are appointed to be read in the Church respectively on each of the said Days, after *Morning-Prayer* or *Preaching*.

So the Thirtieth of *January* is a Day of Humiliation for the Murder of King *Charles I.* but this Act is not directed to be read in the Church.

Hospitallers.

THERE was an Order of Religious Knights erected about the 17th Year of *Ed. 2.* who lived under particular Rules, and of which the grand Master and Two Chaplains only were to be Ecclesiasticks, and these were called *Hospitallers*, because they built an Hospital at *Jerusalem* to receive Pilgrims.

These Knights succeeded the *Templars*, who were so called, because they had a Temple at *Jerusalem* for the purpose aforesaid; but they being suppressed by a Council held at *Vienna* in the Reign of Pope *Clement V.* (c), their Lands here in *England* were transferred by the Parliament to these *Hospitallers* (d), who were also Knights of *St. John of Jerusalem*, and are now those which we call Knights of *St. John of Malta*.

This Order had large Endowments to support themselves, and entertain Pilgrims, and had also many Privileges granted to them by several Popes, of which this was one, viz. that their Lands should be discharged from Payment of *Tythes*.

There are none of this Order in *England*, for it was dissolved in the Reign of *H. 8.* of which I shall give a particular Account.

Several Abbots surrendered their Monasteries to that King in the 29th Year of his Reign; and Two Years afterwards an

(a) Jac. cap. 1. (b) 12 Car. 2. cap. 14. (c) Anno 1312.
(d) Anno 1323. 17 Ed. 2.

A^ct passed (e) to confirm those Surrenders, in which there was a special Clause, that the King and his Patentees should hold those Lands discharged of Tythes in the same Manner as the Abbots held them at the Time of the Dissolution, and this A^ct extended to all *Monasteries* which should afterwards be surrendered to the King.

The *Hospitallers* were not then dissolved, nor until the Year afterwards, viz. by an A^ct made 32 H. 8. cap. 24. by which their Lands and all the *Privileges* they had therein were given to the Crown; but in the A^ct there is no particular Clause to exempt them from Payment of Tythes, so that the Lands being granted (f) to the King, and not surrendered, they are not comprehended within the Letter or Meaning of the A^ct 31 H. 8. and therefore shall pay Tythes.

But my Lord *Dyer* (g) tells us, that Anno 10 Eliz. upon Consideration of this Statute, Judgment was given to the contrary; and Anno 4 Car. the like Question came in debate again, and it was held, that the (h) Exemption which the *Hospitallers* had from Payment of Tythes was a *Privilege*, and though 'tis true that all *Privileges* are Personal, and that when the Person or Corporation to which they are annexed is either (i) dead or dissolved, that the *Privilege* is likewise gone, yet when 'tis given or transferred to another by A^ct of Parliament before the Dissolution of the Corporation it self, they shall enjoy it.

That this *Privilege* was given to the King by the Statute 32 H. 8. and therefore not only he but his *Patentee* should hold them discharged of Tythes, because 'tis not a personal *Privilege* in the King alone to whom it was transferred, but a real Discharge of the Land it self from Payment of Tythes, which accompanies it in whosoever Hands it shall fall.

Incontinency. See Adultery.

Indicavit.

BY the Common Law, if the Incumbent presented by one Patron libelled for Tythes against the Incumbent of another Patron, the Writ of *Indicavit* did lie, which is in the Nature of a Prohibition, and issueth out of the *Queen's Courts* at *Westminster*; 'tis to be brought by the Patron of the Defendant in the *Spiritual Court*, and 'tis to be directed either to the Party himself, or to the Ecclesiastical Judge where the Cause is depending; and 'tis to prevent a Recovery in that Court till the Right is determined at Common Law.

After this Writ was served, all Proceedings in the *Spiritual Court* were stay'd; but then the Patron might have a Writ of

(e) 31 H. 8. cap. 13. (f) Moor 913. (g) *Dyer* 277. b. (h) Jones 182. Latch. 89. Bridgman 32. (i) 2 Brownl. 8. 20.

Right *de advocacione decimarum* by Virtue of the Statute of *W. 2. cap. 5.* but not unless he claimed the Advowson in Fee, for if he was Tenant in Tail, or for Life, he could not maintain a Writ of Right, but in such case he was to appear upon an Attachment, and receive a Declaration, and then plead his Title, and so to proceed as in other Prohibitions; and when Judgment was given at Law, the Cause was remitted to the Ecclesiastical Court, and determined there according as it was at Law.

And it was not material at the Time of the making that Act (k) of what Value the Tythes were; but by the Statute *Articuli Cleri* (l) they must amount to the Fourth Part of the Value of the Church; otherwise an *Indicavit* will not lie if brought by a common Person, neither will it lie if brought before the Libel or after the Sentence in the Spiritual Court.

Nor is it necessary that the Value of the Tythes should be set forth in the *Indicavit*, for if they do not amount to the Fourth Part, that must be shewed on the other side for a Consultation.

But all these Proceedings being now obsolete, I shall not enlarge any more upon this Writ.

Induction.

THIS may be compared to *Livery and Seisin* of a Freehold; for 'tis putting the Minister in actual Possession of the Church, and of the Glebe Lands which are the Temporalities thereof, † for before Induction he hath no Freehold in them.

It may be made by a Bishop, or by a Dean and Chapter, as particularly by the Dean and Chapter of *Paul*, and of *Litchfield*; it may be done by the Patron himself, but not as Patron, but by some other Authority, as if a Bishop is Patron of a Living within his Diocese, in which Cases it must be either by Prescription or Composition; thus the Lord Viscount Mountague doth Induct the *Dean of Batel in Sussex* into that Exempt Deanry.

But the usual Method is by Virtue of a Mandate, under the Seal of the Bishop, to the Archdeacon of the Place, who seldom Inducts any Clerk in Person, but Issues out his Warrant to all Clergymen within his Archdeaconry, requiring them or any of them to do it; then one of the Clergy, taking the Person to be inducted by the Hand, lays it on the Key of the Church, in the Door, and Pronounces these Words:

By Virtue of this Warrant, I induct you into the real and actual Possession of the Rectory of H. with all its Profits and Appurtenances.

Then he opens the Door of the Church, and puts the Person into Possession thereof, who usually tolls a Bell, which is to give the Parishioners Notice that something is doing in the Church.

(k) 2 Inst. 364. (l) Cap. 2. † 4 Rep. 79. Plow. Com. 529. This

This Ceremony being over, the Person thus Inducted is then compleat Incumbent, and entituled *ad Beneficium*, that is, to an Estate in the Glebe and Tythes.

Then the Inductor is to certify the Induction, which he endorses on the Archdeacon's Warrant, and all who are present usually set their Hands to it as Witnesses.

But if the Key of the Church cannot be had, the Clerk to be Inducted may lay his Hand on the Ring of the Door, or on the Churchwall, or on the Fences in the Churchyard, and either of these is sufficient.

And if the Person, who hath Authority to Induct, should be hindered by force from performing that Office, the Common Law hath provided a Remedy by the Writ, *de vi Laicâ amovenda*, directed to the Sheriff, who, by Virtue thereof, may apprehend the Parties, and bring them to the *Queen's-Bench* to be fined; and there are Instances where, in such Cases, that Court hath granted Restitution; so is *Williamson's Case*, Anno 38 *Eliq.* where one was put out of Possession by the Sheriff, and another placed in his room, the Court of *Queen's-Bench* awarded Restitution, and Justice *Croke* cited a President where it had been formerly done.

So is † *Robert's Case*, where the Sheriff returned *non inveni vim Laicam, nec armatam potentiam*; yet upon *Affidavit* made of the Force by which the Party was put out of Possession, the Court of *Queen's-Bench* granted Restitution.

'Tis true, this is not very Consistent with what Serjeant **Moor* hath reported in the same Book about 10 Years afterwards, where he tells us, that in such Case the Court would not grant Restitution, and though the Writ is returnable in that Court, and, together with the Return, is there to be filed; yet he tells us, it was taken off the File, and upon *Affidavit* made, that the Sheriff had removed one by force, and put another in Possession, the Return was filed in the Court of *Chancery*; and that Court granted Restitution upon his Motion: And if a Court of Equity may do it, I can see no Reason why a Court of Law should not.

There is a Note in || *Siderfin* that a *Vi Laicâ amovenda* is but a feeble Remedy, because it doth not restore the Party to Possession; 'tis probable this may be grounded on the Opinion of my Lord *Coke*, in 3 *Bulst.* 92. who tells us, that Restitution cannot be granted on *Affidavits*; for the Justices of Peace cannot grant it upon an Indictment for a forceable Entry, upon the Statute 8 *H. 6.* which must be a Mistake, either in him, or the Reporter; because that Statute was made to Remedy the Defects of the former Statutes in this Case, but by that Statute they have such Power.

† *Moor* 462. * *Moor* 781. || *Sid.* 101.

But to return, the Ceremonies before-mentioned are only to make the Induction publick as it ought to be, that the whole Parish may take Notice of it.

The Person thus inducted must within (*m*) Two Months afterwards read the 39 Articles, and declare his unfeigned Assent and Consent to them after the *Common-Prayer* is begun and before 'tis ended.

And likewise within the said Two (*n*) Months, he must, upon *Sunday*, read the whole Service for that Day out of the Book of *Common-Prayer*, and declare his Assent to it in that very Church to which he was inducted, which he must do in these Words.

I P. S. do declare my unfeigned Assent and Consent to all and every Thing contained and prescribed in and by the Book intituled, the Book of Common-Prayer, and Administration of Sacraments, and other Rites and Ceremonies of the Church, according to the Use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of making, ordering, and consecrating Bishops, Priests and Deacons.

The Person neglecting any of these Things, the Church thereby becomes void, and this he must do *toties quoties* he accepts any other Living.

Induction is a Temporal Act, and therefore if the Archdeacon should either refuse to induct a Parson, (*o*) or to send his Warrant for that purpose, an Action on the Case lies against him, in which the Plaintiff shall recover Damages, but cannot by a Verdict be invested in the Glebe or Tythes; he may likewise be prosecuted in the Ecclesiastical Court, and there he will be compelled by a Sentence to induct the Clerk.

As to this Matter, my Lord Coke calls an Archdeacon an Ecclesiastical Sheriff, and tells us he may be punished in the Spiritual Court, as well as by an Action at Common Law, for refusing to induct a Clerk; but where the Thing to be done is merely Spiritual, and no Temporal Damage can ensue to the Party, for the Neglect or Refusal of the proper Person to do it, in such Case an Action at Law will not lay, but he shall be punished in the other Court.

After he is inducted to the Church (*p*), his Institution shall not be questioned in the Spiritual Court, because the Church is then full, and if the Institution is insufficient, that may be shewn upon the Tryal of the Induction in the Temporal Court, which will certainly be wrong if the Institution upon which 'tis founded is so; neither hath any one a Right to the Tythes which arised during the Vacancy, besides the new inducted Incumbent, for he hath then *jus ad rem*.

(*m*) 13 Eliz. cap. 12. (*n*) 14 Car. 2 cap. 4. (*o*) 1 Bulst. 179. 2 Bulst. 265. Hob. 15. 2 Rol. Abr. 293. Plito. 10. Moor 879. (*p*) 2 Rol. Abr. 282. Plito. 12, 13. But

But if the Authority of the Person who made the Mandate should be determined * either by Death or Removal before the Clerk is inducted, then his Induction afterwards would be void; as if the Archbishop, during the Vacancy of any See, admits and institutes a Clerk, and then makes a Mandate to the Archdeacon to Induct him, and before 'tis executed a new Bishop is consecrated, the Induction afterwards made by Virtue of that Mandate is void, because the Archdeacon derived his Authority from the Archbishop, and such an executory Power ceased upon the Consecration of the new Bishop.

But this Judgment was reversed in the † *Exchequer-Chamber*, because the Archbishop hath a Sovereign Authority throughout his whole Province, and therefore when he doth any thing which a Provincial Bishop ought to do, such Act is not void but voidable.

Besides, his Mandate to the Archdeacon is to one who hath Authority to induct *virtute Officii*, and the Mandate it self is only to intimate that the Person is instituted, and to oblige the Archdeacon to induct him under the Penalty of Ecclesiastical Censures; the Induction is only Ministerial, 'tis the Institution which is the Judicial Act, and which the Archbishop had an undoubted Power to grant, for he is Guardian of the Spiritualties during the Vacancy; and the Law is clear, that an Authority well commenced shall be perfected by the same Person.

Having mentioned before that *Induction* is triable in the Temporal Courts, I shall give one Instance of it to confirm my Opinion, *viz.* a Person was instituted and inducted to a Church, and another got a *Superinstitution* to the same Church; he who was first inducted Libels in the Ecclesiastical Court to set it aside as scandalous to his Title; but it appearing that he who had got the *Superinstitution* was likewise inducted, the Spiritual Court was *prohibited* to proceed for that reason, which they might have done if the *Superinstitution* had been only in Question.

Institution.

WHEN the Ordinary hath admitted any Clerk to a Benefice, he either grants him Institution under his Episcopal Seal, or sends him to his Vicar-General, Chancellor, or Commissary to do it, which is usually in this Form.

Instituo te Rectorem Ecclesie de H. & habere curam Animarum Parochianorum, &c. & accipe curam tuam & meam, by which Words it appears, that Institution is that Act by which the Bishop doth commit to the Clergyman the Cure of the Church.

And this may be done by the Bishop under the Episcopal Seal, or any other Seal besides that of his Office, and though he

* 1 Vent. 309. 2 Lev. 199. † Jones 78.

is not in his Diocese, for 'tis the Act of Court which makes the Institution, and the Instrument under Seal is only a Testimonial of what was done there, to which Instrument some Witnesses should subscribe their Names.

If Institution is granted by the Vicar-General, or by any other Substitute, their Acts are taken in Law to be Acts of the Bishop himself, and he must answer for any Irregularities committed by them.

But the Bishop is prohibited by the Canon (q) to institute a Clerk, who hath been ordained by any other Bishop, without shewing his Letters of Orders.

By an Institution the Clerk hath only (r) *jus ad rem*, and therefore he can do no Act to charge the Glebe, though confirmed by the Patron and Ordinary, till he is actually inducted into the Living, for then, and not before, he hath a Freehold in the Glebe.

But at Common Law an Institution (s) even upon a wrongful Presentation gave the Incumbent such a Right, that if he had been possessed of the Living by the space of 6 Months, this was a Plenarty, and he could not be removed, because he came in by a Judicial Act of the Bishop, who is intrusted by the Law to take care in this Matter; and since by the Writ of *Quare Impedis* it self, it appears that the Law requires *idoneam personam* to be Incumbent in every Parish, when the Bishop (t) hath admitted one to be able, that Implies he is *persona idonea*, and then the Law hath its final Intention, that is, the Church is then sufficiently provided with a Clerk, and 'tis *plena & consultata*, which puts the rightful Patron out of Possession, but he is not without Remedy, for he might have a Writ of Advowson, and recover that of which he was divested by this Usurpation.

But in some Cases, an Institution upon a wrongful Presentation makes no Plenarty against the true Patron, for so is the 4th Resolution in * *Green's Case*, which was thus:

¶ Tenant for Life, remainder in Fee to another of a Mannor, to which an Advowson was Appendent; the Tenant for Life presented one *Durston*, who was inducted, and afterwards deprived, for not reading the 39 Articles, though Justice *Telverton*, who Reports the same Case, takes no Notice of the *Depri- vation*, but tells us the Benefice was void for not reading the Articles; and that *Durston* continued Incumbent during his Life; but both my Lord *Coke* and he agree, that the Patron had no manner of Notice of the Avoidance: Afterwards both the Tenant for Life, and *Durston* died, and then the Queen reciting Her Title to Present by *Lapse*, presented *Baker*, who was inducted; and he in remainder presented *Green*, who was likewise inducted; and in an Action of Trespass brought by *Green*, and a

(q) Can. 39. (r) Plo. Com. 528. (s) 2 Inst. 356. (t) 2 Rol. Abr. 349, 294, 312. 1 Rol. Rep. 191, 227. 4 Rep. 72. * Rep. 29. Nel. 7. Spe:

Special Verdict, he had Judgment; because the Institution of *Baker* being upon a wrongful Presentation the Church was still void, as to the true Patron; for the Queen's Presentation was wrong, because She presented *ratione Lapsus*, when She could have no such Title without *Actual Notice* given to the Patron, and his neglect to Present after such Notice; and therefore the Church being void as to him, there was no Occasion to bring a *Quare Impedit* to remove *Baker*, but his Clerk might bring an Action on Trespass, &c. By which it appears, that such an Institution giveth no Right, but only a Provisionary Possession to Entitle him to the Tythes, and other Profits, but the Incumbent hath no Freehold or Interest in Law, either to bring an Ejectment or to have a *Quare Impedit* brought against him.

The Books are plain, that upon an Institution the Church is full against a common Person, and likewise against the Queen, if She hath no Title but what She derives from a Subject, because the Incumbent hath then a Freehold, which is begun, tho' not completed till Induction.

And if the Archbishop should inhibit the Archdeacon to induct the Clerk thus instituted, he may do it notwithstanding such Inhibition, and the Induction shall be good.

And to give an Instance that the Church is full upon an Institution, I will put this Case, *viz.* If the Grantee of the next Avoidance Presents and his Clerk is admitted and instituted, and should die before he is inducted, he shall not Present again, for his Grant was satisfied by the Institution of his Clerk, which proves that the Church was then full.

But a bare Institution without Induction doth not make a Plenarty against the Queen, where She hath a Title to Present in Her own Right (*u*), or by Virtue of Her Prerogative; and therefore if her Presentee should die before Induction, She may present again, because She had not the full and complete Effect of Her Presentation.

Now, though it doth not make a Plenarty against the Queen, (*x*) yet if the Person thus instituted and not inducted doth take a second Benefice, it shall make the first void, because by the very Institution he had accepted the Living; and the Words of the Statute are, *viz.* (*y*) *If a Parson having one Benefice with Cure accepts another, &c.*

And if in such Case there should be a Dispensation (*z*) to hold both the Livings, it will not serve, for coming after Institution 'tis too late, because the Church is full by it, and both the Patron and Ordinary had executed their Authority, and can never revoke it, the Institution being matter of Substance, and the Induction, which is to follow, is no more than a Ceremony, to give the People Notice of the Possession.

(*u*) 2 Inst. 356. 9 Rep. 132. (*x*) Dyer 360. 4 Rep. 39. (*y*) 21 H. 8. (*z*) 4 Rep. 79. Moor 443. 448.

Besides, by this very Act of the Bishop * the Cure of Souls is transferred from him to the Clerk, though it doth not always follow, that an Institution to a Benefice should imply that the Clerk hath *curam animarum*, because the Queen hath several *Donatives* in Wales, † which are not properly Benefices with Cure of Souls, but yet the Incumbents on such Donatives come in by Presentation and Institution.

If the Bishop refuseth to grant Institution, no Action (a) of the Case lies against him, the Party may have a Remedy in the Court of Audience by a *Duplex Querela*, &c.

Lastly, Institution it self is properly Cognizable in the Ecclesiastical Court, but if after (b) *Induction* a Man is sued there, supposing his Institution was void, that shall be tried in the Courts at Law, because, by the Induction the Person had a Freehold in the Benefice, which must be tried at Common Law.

Isles in Churches. See Seats:

Jus Patronatus.

WHERE Two Persons Present Two Clerks to the same Church, by different Titles, the Church is become Litigious, because the Bishop doth not know who is the Right Patron, and by consequence cannot tell which Clerk to admit.

So 'tis if Two Patrons Present one Clerk, because the Bishop cannot admit such Presentee generally, but must admit him as the Clerk of one.

But if Two Coheiresses Present several Clerks by the same Title, that is, where an Advowson descends to them, and they cannot agree to Present one and the same Clerk, so that they Present severally, and this is found by a Verdict in a *Jus Patronatus*, the Bishop is bound to admit the Clerk of the Eldest, for the (c) Church in such Case is not Litigious, nor if Tenants in Common Present several Clerks, for the Bishop may admit the Clerk of either, but if they do not agree in their Presentation within Six Months after the Avoidance, the Bishop may Collate.

So if one Present, and the Bishop doubts his Title, (as in some Cases he may) then he may require to be satisfied in a legal Method; as for Instance, if a Parson is deprived, Notice must be given to the Patron, otherwise no Lapse incurs, and if upon such Deprivation the Bishop should Collate and Die, how shall his Successor know, that Notice was given to the true Patron?

And therefore the Law hath provided a Security for him, and that the Cure may not long be neglected, and this is by a

* Mod. 12. † Sid. 427. (a) 1 Rol. Rep. 64. (b) 2 Rol. 1 Abr. 282. 294. (c) 21 H. 6. 45. a.

Jus Patronatus, which may be brought at the Instance of one or both Parties, that is, either by Patron or Clerk, but the Bishop is not bound to award it *ex officio*, but may suffer the Church to Lapse; yet when he is required to do it, and refuseth, he is a Disturber, and in such Case the Church shall not Lapse, nor after a Verdict found upon a *Jus Patronatus*, because the Bishop ought to Present that Patron's Clerk for whom it was found.

The Proceedings upon it are as follow ;

The Bishop Issues forth a Commission under his Episcopal Seal, directed to his Chancellor, or to some other Civilian, and sometimes to Common Lawvers, to enquire who hath the Right to Present to such a Benefice.

These Commissioners have Authority to Summon a Jury, which is done by a *Mandate* under their Hands, &c. directed to some Officer for that purpose, half of which Jury must be Clerks, and the other half Laymen ; but there is no Necessity that Six of each should be the compleat Number, for they may cause more than Twelve to be summoned and Sworn, so that they Swear no more Laymen then Clergymen.

But Twelve is a Full Jury, and if they do not appear, the Clergymen may be punished by Sequestration, and the Laymen by Excommunication.

If they appear, the Commissioners are in the first Place to Swear a Clerk, and then a Layman, till the whole Number are Sworn.

The Points which they are to inquire into are,

1. Whether the Church is void.
2. Who presented last.
3. Who is the Rightful Patron to the void Church.
4. Who ought to Present to the same.

These Articles are to be publickly read and delivered to them ; but 'tis requisite that the Jury should find for that a Patron who presented last, for if he is the true Patron it will appear so upon the Tryal of a *Quare Impedit*, if he is not, then he presented by Usurpation, and if his Clerk was Inducted, and the Church was full of him for Six Months, the Patron who had the Right must recover it in a Writ of Right of Advowson, before he shall Present again.

After the Jury are Sworn, then Council is to be heard on both sides, as at all other Tryals, &c. to maintain the respective Titles of the Patrons.

Then the Jury give in their Verdict, and 'tis necessary this should be done at that very Time, though the Commissioners may give them longer Time to consider of the Evidence; but if they will not agree, or refuse to give a Verdict, or be equally divided, or find a Special Verdict, the Bishop may Discharge them, and cause another Jury to be Sworn.

As to the awarding a *Jus Patronatus*, 'tis not a Thing of Necessity, 'tis no more than an Inquest of Office, and for the Bishop's Security, that he may not be a Disturber, for he may at his Peril take Notice which (x) Patron hath the Right, and admit his Clerk accordingly, and this he may do even after a Verdict in a *Jus Patronatus*, but if in a *Quare Impedit* brought against him, &c. the Title is found for the Plaintiff, this will make the Bishop a Disturber, for it seems to be Injustice, and against the true Intention of the Law to admit a Clerk whose Patron's Title was not found by the Jury, but against him.

Therefore a Verdict in this Case being only for the Safety of the Bishop; and since it puts the Patron upon some Charge to satisfy him in the Right, he ought to receive the Clerk according to the Verdict; and it was my (y) Lord *Hobert's* Opinion, that if he doth otherwise, an Action on the Case lies against him, in which Action the Patron may recover Damages for the Expences, and delay occasioned by this Means; but such Action will not lie, till he hath recovered his Title in a *Quare Impedit* brought against the other pretending Patron and his Clerk, but not against the Bishop, for if he is named in that Action, no other will lie against him.

As the Church may become Litigious by a double Presentation, it may likewise be so by a Double *Jus Patronatus*, for the Bishop may award Two Commissions of enquiry at the Instance of each of the Patrons, (tho' 'tis not usually done) and if in such Case the Juries find distinct Titles in each Patron, the Bishop can have no Direction by such Verdicts, but may refuse each Clerk, and suffer the Church to lapse.

So if a Verdict is given for one of the Patron's, and if before he Presents his Clerk again to the Bishop, as he ought to do, another pretending a Title should Present his Clerk, the Bishop may award a new *Jus Patronatus* to determine the Right between the new and old Patron.

But tho' the Clerk, for whose Patron the Verdict is found, and so certified by the Commissioners to the Bishop, ought to be presented again to him for Admission, it may be upon the former Presentation, and not a new one; and if he is negligent in this Matter for Six Months, the Church is lapsed.

Upon the whole Matter, a Verdict in a *Jus Patronatus* is a good Warrant for the Bishop to admit the Clerk of that Patron for whom 'tis found, and it doth not bind the Right of the other Patron, for he may recover it in a *Quare Impedit* notwithstanding such Verdict; and if he doth, the Bishop is not a Disturber, tho' he hath admitted the Clerk of the other, because the Verdict is his Security, and 'tis likewise some Evidence for that Clerk, that his Title was found to be the best.

(x) 1 Leon 168. (y) Hob. 318.

King.

THE Queen is Patron Paramount of all the Benefices of England; therefore, if other Persons, who are intrusted by the Law, do neglect their Duty in filling the Churches, then by the natural Order and Course of Government the Right devolves on Her, who being vested with the supreme Power, is to supply the Defects of others, and this is done by presenting fit Persons to void Churches.

Under this Title I shall treat,

1. Of the King's Right to Present upon Lapse, and in what Time it must be done.
2. Whether there can be an Usurpation on his Right to Present; and whether he can Present by Usurpation.
3. Where he shall have a Writ to the Bishop.
4. Where his Incumbent shall be Outed.
5. Of his Right to Present whilst the Temporalities are in his Hands.
6. Of his Right to Present upon an Avoidance by Cession.
7. Where his *Presentation* shall be void, and where it shall be revoked.
8. In what Cases his Lands are privileged from Payment of Tythes.

By the Statute 17 Ed. 2. cap. 8. 'tis enacted, That if a Stranger Presents to a Church, which is in the Gift of the King, and he should recover his Right in a Tryal at Law; tho' after 'tis lapsed to the Bishop, that shall not prejudice his Title, so as he Presents within Six Months after such Recovery; from which it may be inferred, that if the King had not presented within that Time, his Church should Lapse.

Of his Right to Present by Lapse.

My (a) Lord Coke tells us, That in the Reign of his Son and Successor, the Clergy pretended that Lapse should incur against the King, which occasioned that King to publish this Resolution.

Quod ab exordio nascentis Ecclesia in Anglia Reges ad omnia Ecclesiastica Beneficia Qualitercunq; vacantia & ad eorum Collationem spectantia quancumq; placeret eis jure Regio presentarunt.

Now, the (b) Words *Qualitercunq; vacantia* seem to comprehend as well such Benefices to which he had a Right to Present *Jure Prærogative* as by Lapse, &c. as those which he had *Pleno jure*; and the Register tells us, in such Cases *Nullum tempus occurrat Regi ex consuetudine hactenus obtenta in Anglia.*

But the Law is otherwise; for if the King had a Right to Present by Lapse, and suffers either the true Patron to Present, or any other by Usurpation, and his Clerk should be inducted

(a) 2 Inst. 360. (b) 2 Inst. 360.

and die, the Patron and not the King shall Present; for where the Law appoints a certain Time, both for the Commencement and Determination of the King's Title, if he suffer that Time to expire he hath lost his Turn; as for Instance, in this very Case the King's Title began upon the Neglect of the Archbishop to Present within his (c) Six Months; now, if he will suffer another to Present, and the Clerk thus presented doth afterwards die Incumbent, then his Interest is determined; for the Rule *Nullum tempus occurrit Regi* will not hold in such Cases, since the King is to have but one Turn, and that must be the next.

'Tis true, where he hath the Advowson in Fee, there he shall not be divested of his (d) Right, even upon a double Usurpation and Plenarty, for it continues still in him, and the Presentation by a Subject is but Matter *In fait*, which, tho' coupled with Institution, which is a Judicial Act of the Bishop, yet it shall not prejudice the King, because 'tis grounded on a Wrong, yet such Usurpation will bind him *quoad* the Possession; but the Incumbent may be remov'd by a *Quare Impedit*, without putting the King (who is the true Patron) to his Writ of Right.

I grant it was otherwise adjudged in the (e) Common-Pleas, between the King and *Campion*, against the Opinion of the (f) Chief Justice *Anderson*; but that Judgment was afterwards reversed in *B. R.*

'Tis made a Quære in (g) *Dyer*, if the Queen had a Title to Present by Lapse, and afterwards the Bishop grants Institution to the Clerk of the true Patron, Whether that shall bind Her Title or not? My (h) Lord *Hobert* was of Opinion that it did, because the Patron's Right always continued till the Queen's Title by Lapse should be executed; and if he Presents to the Bishop, before the Queen Presents Her Clerk, he is bound to admit his Presentee.

But the latter Authorities are otherwise; for the (i) Title by Lapse is so vested in the Queen, that She may at any Time remove the Incumbent by a *Quare Impedit*; but if he should die Incumbent, then She hath lost Her Turn.

And so it is if the Incumbent should be deprived without any (k) Covin, as it was adjudged in a Case between the Queen and the Bishop of *Norwich*; 'tis true, in the very next Year, *viz. Anno 32 Eliz.* it was adjudged otherwise, that is, if the Incumbent be deprived, it should not bar the Queen of Her Turn to Present by Lapse, because it was the Act of the Party, which was the Cause of his Deprivation; but the true Reason is given by (l) *Gouldsbrough*, *viz.* That the same Person who was

(c) Hutt. 24. (d) Yelv. 90. Brownl. 166. (e) 2 Cro. 53. (f) 2 Cro. 123. (g) Dyer 277. a. (h) Hob. 157. (i) Her. 125. 2 Rol. Abr. 351. Plito 25. 2 Lut. 1086. (k) 4 Leon. 217. (l) Gouldsf. 79, 83, 86.

deprived was presented again ; and because that look'd like Collusion, it might induce the Court to give Judgment for the Queen.

Serjeant *Moor*, who Reports the same Case tells us, That (m) Collusion shall not be intended, because the Deprivation was a Judicial Act ; and therefore the Court at first inclined against the Queen's Title, but afterwards gave Judgment for Her.

The other Reporters do not mention that the Person deprived was presented again, but another ; and yet the Queen had Judgment.

Justice *Crooke* says, it would be inconvenient that the Queen should lose Her Presentation by the Act of the Incumbent, which occasioned his Deprivation.

Justice *Owen* and *Leonard* tells us, That the Deprivation might be by Collusion, and Serjeant *Moor* says it might not ; but that Collusion ought to be averred, and should never be intended, however, they all agreed that Judgment was given for the Queen ; but it must necessarily be upon a supposed Collusion, for it was adjudged contrary before, even in the Case of Deprivation, and so it was in the Case of Resignation, which is the voluntary Act of the Party, as well as Deprivation, which is occasioned likewise by his own Act ; and yet in such Case it was held, that if the (n) Party resigns before the King hath presented upon a Lapse, is Turn is lost, for he hath it by Virtue of his Prerogative, *Pro unica Vice tantum*.

And 'tis for this Reason, that if the King hath Presented by (o) Lapse, and his Clerk is inducted, and afterwards looseth his Incumbency by ill Pleading, in an Action brought against him, to try the Right ; he shall not Present again, because he had but one Turn, and that was executed.

'Tis agreed that the King hath a Title to Present by Lapse ; but it hath been a Question if he should die before he Presents, Whether his Successor shall be entitled to it ? Or whether he is not barred by the Statute 25 Ed. 3. cap. 1. by which 'tis enacted, That *neither the King or his Heirs shall Present to any Benefice in the Right of another, which happened in the Time of his Progenitors, saving to him and his Heirs all Presentments in another's Right, fallen or to fall in his Time, or in Time to come.*

Some of the Judges were of Opinion, that there was no such Exception in the (p) Act, but most of them were satisfied to the contrary ; and all agreed, that tho' he Presents by Virtue of his Prerogative, yet 'tis in the Right of the Patron.

Lastly, If a Clerk neglects to read the 39 Articles, and continues in Possession during his Life, the (q) Church by this Means would have been void ; but then Notice must be given

(m) Cro. Eliz. 119. Owen 9. Moor 259. 4 Leon. 95. (n) 2 Cro. 316. 1 Brownl. 161. (o) 1 Leon. 194. (p) 2 Cro. 355. (q) Yelv. 7. 6 Rep. 29.

to the Patron, which was not done. The King Presents on a supposed Title by Lapse; but such Presentation is void, because, as to the Patron, the Church is full, till he had Notice of the Avoidance.

Whether there can be an Usurpation upon the King, so as to bar his Right, and whether he can Present by Usurpation, &c.

Next I shall consider whether there can be any Usurpation upon the King, so as to bar his Right, and whether he can Present by Usurpation. And as to this Matter it was formerly held, that if there were an Usurpation upon his Right, he might Present after the Death of his Incumbent, without recovering that Right in a Writ of Advowson, but he could not Present the Clerk of the Usurper to the same Church, because it was full of him, and he must first be removed by a *Quare Impedit*; but he might by his Letters-Patents confirm the Title of such Incumbent, reciting the Usurpation, &c. but then he must be compleat Incumbent; for if he was only instituted and not inducted, such Confirmation would not bar the King; but he might bring a *Quare Impedit*, and remove the Clerk of the Usurper, because he was in Possession when the Confirmation was made.

But now the Law is, that there can be no Usurpation upon the King, where he hath an Inheritance in the Advowson, so as to bar his Right; for the Law protects it, that he can receive no Prejudice by any Usurpation.

This was denied, (r) *Anno 18 Eliz. viz.* That the King had no Manner of Prerogative in this Case, tho' he claim in his own Right, because 'tis necessary that the Church should be full of some Body; and as he might gain the Possession by a Presentation, without a Title, so he might be put out of Possession by a double Usurpation.

But the Chief Justice *Anderson* was of a contrary Opinion, that a double Usurpation did not bind the King's Right, for as he could not be disseised of Land, so he could not be put out of Possession of an Advowson by any Usurpation; 'tis true, he may be put out of Possession of those Things which are Transitory, but not out of an Inheritance; and according to his Opinion, a Writ of Error was brought upon that * Judgment, and it was reversed in B. R. because the Law so protects the King's Inheritance, that no Wrong done by a Subject shall divest him of his Right; but in this Case he must bring a *Quare Impedit*, † for he cannot Present till the Incumbent is removed.

As to the King's Presenting by Usurpation (a) there has been a Distinction made, that if he Presents generally, without reciting any Title, it may be by Usurpation; but if he recites a Title where he hath none, that shall never be taken to be by Usurpation, for he was mistaken in his Title, and can do no

(r) Dyer 351. 2 Cro. 54. * Yelv. 90. 1 Brownl. 166.
† Rol. Abr. 372. (a) Hob. 302.

Wrong to any Body (b), so that the Usurpation must be in the Incumbent, who procured himself to be instituted upon such a Presentation (c), and he is the Wrong-doer; and the *Quare Impedit* must be brought against him, and he may be removed 20 Years afterwards, for the Presentation is void, and the true Patron was never out of Possession.

'Tis true, the Court was of Opinion, that the King might Present by Usurpation (d), and yet they held that he could not do any Wrong, which seems to be a plain Contradiction; but it was solved by this Distinction, viz. That it was not the Presentation by the King, but the Institution by the Bishop which made the Usurpation; and yet they held that could not properly be a wrong, because it was a Judicial Act.

If the King recover in a *Quare Impedit* against the Incumbent, who claimed by Collation from the Bishop, and hath another *Quare Impedit* depending against the same Bishop for the same Church; tho' these Suits are commenced upon several Originals, yet the King shall not have a Writ to the Bishop upon the first Judgment, until the other Action is determined, because there are several Defects supposed to be in these several Actions, and he must recover against all before the Title can be apparent in him.

Where he shall
have a writ to
the Bishop.

If in a *Quare Impedit* (e) brought, it should appear upon the Pleading, that neither the Plaintiff or Defendant have a Title, but that the Presentation is in the King, the Court may award the Writ to the Bishop for him, and that may be done without his Request, because the Judges are of his Council.

This was my Lord *Hobert's* Opinion (f) in *Colt and Glover's* Case, but that it would be otherwise if the Verdict found a Title in the King, where he was no Party to the Action, because 'tis out of the Issue, and mere Surplusage, which might be answer'd by either Party.

But if the King should bring a *Quare Impedit*, and, upon (g) the Pleading, the Issue should be whether he had the whole Advowson or not, and the Jury find that he had a *Third Part* and no more; but that it was his Turn to Present to that very Avoidance, altho' the Issue is found against him, yet he shall have a Writ to the Bishop, because the Matter found by the Jury was not quite out of the Issue, and it appeared by the Verdict that he had a Title.

So that the King's Title must appear upon the Record in Pleading, and not upon Evidence where he is no Party to the Action; and his Title thus appearing, the Court may award a Writ to the Bishop to admit his Clerk.

(b) Cro. Car. 592. (c) Hutt. 66. Vaugh. 14. (d) Sid. 162.
(e) 1 And. 33. 1 Leon. 523. (f) Hob. 163. (g) 2 Rol.
Abr. 386.

where his Incumbent shall be Ousted.

If the King should Present by Usurpation, and his Clerk should be instituted, and then a *Quare Impedit* is brought against him, (for it cannot be brought against the King) (b) and then he Presents another who is instituted and inducted, if the Plaintiff doth recover; this second Clerk shall be ousted by that Judgment, because he came in before the first Clerk's Title was determined.

So if such Presentee should be instituted and inducted, and then resigns pending an Action brought against him, and the King Presents another (i), and then the Plaintiff in the Action recovers, this last Incumbent shall be removed, tho' the Judgment was not had till Six Months after the Induction, because he came in *pendente lite*.

'Tis true, Serjeant *Anderson* (k) and the Queen's Council *Anno 21 Eliz.* were of a contrary Opinion; and their Reason was, because this second Incumbent, who came in by the Resignation of the other, was neither Party or Privy to the Action; but my Lord *Dyer*, who reports the Case, tells us, that their Opinion was not Law; for if there are several Incumbents *successive*, and they come in *pendente lite*, they shall be severally removed, and so my Lord *Coke* (l) says, that to his Knowledge it was adjudged.

But Eight Years afterwards, when Serjeant *Anderson* was Chief Justice of the Common-Pleas, he took Notice what my Lord *Dyer* had reported of him, whose Book was printed but Four Years before; and he tells us, it was his Opinion, that such Clerks should not be removed (m), and that he was still of the same Mind, but with this Distinction, that if the Incumbent came in by Virtue of a Title Paramount to that of the Plaintiff in the Action, in such Case he should not be removed, but if he came under a Title which accrewed since that of the Incumbent, then he should be removed.

If the Plaintiff in a *Quare Impedit* (n) should recover, and before he hath any Writ to the Bishop he should be Outlawed, then the Incumbent resigns, and the King, supposing he had a Title by the Outlawry, Presents him again, and he is instituted and inducted, and then the Outlawry is reversed, the Plaintiff shall have a *Scir' Fa'* to have Execution of his Judgment, because nothing was forfeited by the Outlawry, but the *Presentation*, and by the Reversal the Party was restored to what he had forfeited, that is, to his Title to Present, and by Consequence the King had none.

(b) 6 Rep. 62. (i) 2 Rol. Abr. 391. (k) Dyer 364. (l) 1 Rol. Rep. 213. (m) Goulds. 105. (n) 2 Rol. Abr. 321. Moor 263. 1 And. 179.

The Temporalities of Bishops are such Lands and Lay-Fees as have been annexed to their Sees, either by Kings or other great Persons, and which they enjoy as they are Barons of Parliament, and are distinguish'd from the Spiritualities, which are those Profits which they receive as Bishops, and not as Barons; such are the Duties of Visitation, or Ordaining and Instituting Priests, &c.

Of his Right to present whilst the Temporalities are in his Hands.

When these Temporalities are seized by the King, he hath the Privilege to present to such Benefices which become void during the Seizure; and to such which shall become void after the Death of any Bishop, and before such Seizure; and likewise to such where the Bishop in his Life-time had presented or collated, if the Clerk was not inducted before his Death, because the Church is not full against the King till Induction.

And as he may Present in the Cases (o) before-mentioned, so he may revoke such Presentation; and if the Presentee should afterwards be inducted, and then the King should confirm his *Presentation*, reciting that he was Canonically Instituted upon it; tho' by this Means the Presentee is reputed to be his Clerk, and should die Incumbent on the Benefice; yet the King shall Present again, for he was mistaken in his Confirmation, because the Incumbent was never in upon his *Presentation*, that being revoked before he was instituted, and so the Confirmation is void.

Therefore the new Bishop ought to take Care that the King do Present upon such Intruder, or by some judicial Act to declare that the Church is void, and so to sequester the Profits, if the King should refuse to Present.

I have treated at large of this Matter under the Title *Cession*, and therefore shall only add in this Place, that the King hath a Right to Present in this Case; but then he must take Advantage of the first Avoidance (p), and not suffer another to Present, for if such Presentee should die Incumbent, his Prerogative shall not extend to give him a second Turn.

Of his Right to present upon an Avoidance by Cession.

This is a Prerogative which operates not only upon an Avoidance, but it must be upon an Avoidance by Creation; and therefore if the Benefice is to be held in *Commendam* with the Bishoprick, and the Bishop afterwards resigns, or is translated to another Bishoprick, the King shall Present, because the Dispensation is determined by his Removal, and then the Church is void by his being made a Bishop.

(o) Dyer 292. a. (p) 2 Cro. 691. 2 Rol. Abr. 343. Moor 399. Vaugh. 19. Cases in Parliament 164. Cro. Eliz. 790.

But if the Bishop dies (q) before Resignation or Translation, then the Church becomes void by his Death; and in such Case the Patron and not the King shall Present, because the *Commendam* to hold his Benefice with his Bishoprick was as advantageous to the King as a *Presentation*, it keeps the Church full, and by Consequence there is no Avoidance, upon which the Prerogative may operate, for the Incumbent is still in upon his old (r) Title, tho' made a Bishop, so that the Avoidance may happen upon his Death or Resignation, but not by his being made a Bishop (s); but this must be understood where he obtains a *Commendam Retinere* after he is Elected, and before he is Consecrated; for if it comes after his Consecration, it shall not amount to a Presentation to satisfy the King's Turn, because the Church is then actually void, and the King may Present.

I shall conclude this Title with a Case which happened *Anno 2 Will. (t)*, it was an Ejectment for the Rectory of *Great Halsey in Oxfordshire*, of which one Redding was Incumbent, who in *February 1687.* accepted another Benefice with Cure, &c. without a Dispensation, so that the first Living being void, and neither the Patron or Ordinary Presenting in their respective Turns, the Title came to the King, and the Church afterwards became actually void; and the Bishop collated the Plaintiff, who at a Tryal at Bar was Nonsuit, because he could not have a Title from the Bishop after it was gone from him to the King.

Where the Presentment shall be void and rebok'd.

If he Presents to a Church and mistakes his Title, 'tis void; as if he Present *Ratione Lapsus*, when it appears he had a Title *Jure Pleno*, 2 Cro. 252. 2 Rol. Abr. 350.

Anno 18 Eliz. it was made a Question, that if the King's Presentee upon a Lapse (u) should die after Institution and before Induction, Whether he should Present again or not? And it was adjudged he should, because he had not the Effect of his first Presentation; for the Incumbent dying before Induction, that was a Revocation of his Presentment in Law.

So if he Present one, and afterwards (x) Presents another, without any actual Revocation of the first *Presentation*; yet this second *Presentation* is a Revocation in Law of the first, unless it was obtain'd by deceiving the King, Pending a *Quare Impedit* brought by him.

If the King should die before his Clerk is instituted, this is a Revocation in Law; but if he actually revoke it before Institution, and afterwards the Clerk should be instituted and inducted before the Bishop had Notice of the Revocation, yet the Presentation is legally revoked; for Notice to the Bishop is

(q) Vaugh. 27. (r) Davis 77. (s) Vaugh. 20. (t) Jones and Hascard. (u) 2 Rol. Abr. 353. 9 Rep. 132. (x) 2 Rol. Abr. 354. 1 And. 38. Lane 103.

not material as to the Substance of the Revocation, 'tis only to make him chargeable as a Disturber, if he proceeds to give Institution after Notice.

Lastly, Such is the King's Prerogative, that he may revoke his Presentation at any Time before Institution, and some have held even after a Mandate for Induction, if before 'tis executed.

He is *Persona Mixta*, and therefore, as he is capable of having Tythes, so he may prescribe *In non decimando*; but this is a personal Privilege, which *nunquam egreditur Personam*; and therefore, if he grant those Lands to another, the Grantee shall not be discharged (*y*), because a Subject cannot partake of the King's Prerogative.

In what Cases his Lands are privileged from Payment of Tythes and what not.

But if he make a Lease of such Lands, the Lessee shall be discharged of Tythes, because the Reversion is in the King (*z*), and so the Privilege still continues.

There is a short Note in *Brownlow*, * that the Court was of Opinion, if the King hath ancient *Forrest Lands* discharged of Tythes, and he grants those Lands to another, that the Grantee shall be discharged of Tythes, which is contrary to the latter Authorities.

Lapse.

WHEN a Patron neglects to Present a Clerk to a Benefice within Six Months after 'tis void, then 'tis lapsed to the Bishop; and if he doth not collate within Six Months following, it lapses to the Archbishop; and if he neglects to collate within his Six Months, it lapses to the Queen.

And here I shall treat,

1. Of the respective Rights of the Ordinary, and of the Queen, to Present by Lapse, and in what Case it must be done.
2. Where the Bishop shall be entitled to collate on a Lapse, and where not.
3. Where after a Lapse incurred, the Bishop shall have no Benefit by it.
4. How the Six Months shall be computed, and from what Time.

My Lord *Hobert* tells us, that a Lapse is not an Interest vested in the Person, but a Trust in Law, to do that for the Patron which 'tis supposed he would have done himself (*a*), but had neglected it, and therefore that a Collation by Lapse is *Jure Devoluto*, and in Right of the Patron.

Of the respective Rights of the Ordinary and the Queen.

(*y*) Moor 486. Jones 387. Stiles 137. Cro. Eliz. 785. (*z*)
Hut. 60. *1 Brownl. 31. (*a*) Hob. 154. But

But this is denied by the learned Bishop of Worcester, viz. That the Ordinary in such Case Presents *Jure Pleno*, because the whole Diocess at first was under the Care of the Bishop; and it was particular Indulgence to Patrons, that they had any Right to Present to vacant Churches, which if they neglected, then it returns to the ancient Right, and the Bishop Presents, as having an Interest in it, and not otherwise.

'Tis true, there is afterwards a *Devolution* allow'd by our Law, and that is from the Bishop to the Metropolitan, not as Ordinary, but as Superior, which is distinct from that Right which the Bishop hath by Lapse.

I grant that the Archbishop in some Respects may be said to be the Ordinary of the whole Province; but that is to supply the Defects of his Suffragans, and not in respect of any immediate Jurisdiction.

In the same Manner it devolves to the Queen, who, *Jure Coronæ*, is to see all Places supplied with Persons fit for them; and if those entrusted by Law neglect their Duties, then by the natural Order of Things it falls to the supreme Power, which is to supply the Defects of all others.

Some have been of Opinion, that before the Council of *Lateran* there was no such Thing as a Lapse to the Bishop; but that if the Patron neglected to Present, in such Case the Bishop was to provide one to serve the Cure, and the Patron might Present at any Time.

This was the Opinion of Mr. *Selden* (b), and my Lord *Coke*, who cites *Bracton* and *Fleta* to maintain it; he would not mention *Britton*, probably, because he calls it the Council of *Lyons*, which he did mistake for *Lateran*.

It had been more to the Purpose if he cited the Constitution of Pope *Alexander III.* which he sent hither to this Effect, viz. That if Difference happened about the Right of Patronage, the Bishop might sequester the Profits without fixing any Time.

But there is nothing in these old Law-Books to justify an unlimited Power, which the Patron had to Present before that Council, the Words tend almost to the same Sense in both those Books.

Cum propter lapsum temporis de Constitutione Laterensi si partes fuerint discordes ultra sex Menses, pertinebit ad Ordinarium collatio, nisi partes consentirent de unica Persona idonea presentanda; which is no more than if a Dispute should happen about the Right of Patronage, the Bishop might collate Six Months after the Avoidance, it doth not say that the Patron might Present at any Time.

And this agrees with the Register (c), which is the most ancient Book of the Law, where we have a Writ of Prohibition

(b) Seld. Hist. Tythes 389. 2 Inst. 361. Bract. 341. Fleta lib. 5. cap. 14. (c) Reg. 42, b.

to the Bishop of *London*, signifying that it was according to the Law and Custom of *England*, that Bishops should not Present by Lapse before Six Months are past after the Avoidance; and that they had not used so to do, *aliquibus temporibus retroactis*.

St. Germin (*d*), who wrote *Anno 23 H. 8.* is of the same Opinion, that by the Common Law all Patrons, as well Lay as Spiritual, had Six Months to Present before a Lapse should incur.

'Tis generally true, that after an Avoidance for Six Months, and no Presentation made to the Bishop, he hath Power to collate to the void Church by Lapse; but there are some Cases where a Lapse shall not incur after such an Avoidance.

Where the Bishop shall be entitled to collate by Lapse, and where not.

He may collate by Lapse (*e*), where Two Patrons pretend a Right, and one sues the other without naming the Bishop, and recovers, and the Six Months pass pending the Action, for in such Case the Bishop was in no Fault.

So if after such a Recovery the Defendant brings a Writ of Error upon the Judgment, and the Six Months expire before the Errors are determined.

So if a *Quare Impedit* (*f*) is brought against the Bishop and Patron, who never presented any Clerk to him; if the Six Months expire, the Bishop shall collate, tho' his Title accrewed by Lapse, pending the Writ, for he was no Disturber (*g*), and 'tis unreasonable he should lose his Title by fraudulent Action brought against him.

If his Title should accrew in the Visitation of the Archbishop, and whilst the Ordinary is inhibited, by which Inhibition all Acts of Jurisdiction are for a Time suspended, tho' he cannot institute a Clerk himself, yet he ought to Present him to the Archbishop, who is to do it.

So if the Bishop (*h*) collate, and before his Clerk is inducted, the Patron presents, in this Case the Bishop may refuse him.

But in these Cases following a Lapse shall not incur after Six Months Avoidance, *viz.*

If the Bishop refuse a Clerk without a Cause, and then the Church becomes litigious, no Lapse shall incur. So 'tis if he refuse to examine a Clerk presented (*i*).

If a *Quare Impedit* is brought against a Bishop, Patron, and Clerk, and the Bishop claims nothing but as Ordinary, and the Plaintiff recovers, and then the Patron and Incumbent join in a Writ of Error upon that Judgment, pending which Writ the Bishop dies, and another is consecrated, then the Incumbent takes another Benefice with Cure, so that the first is void,

(*d*) Dr. and Stud. 116, b. (*e*) 2 Rol. Abr. 365. Hob. 2014 2 Cro. 93. (*f*) Hob. 270. 2 Rol. Abr. 366. (*g*) 2 Rol. Abr. 357, 367. (*h*) Dyer 277. (*i*) 2 Rol. Abr. 366. Plito 3, 5, 6.

and the the Six Months pass, and then the Judgment is affirmed, the Ordinary shall not be entitled to Present by Lapse.

Where after a Lapse the Bishop shall have no Benefit by it.

In some Cases the Bishop shall have no Benefit after a Lapse incurred; as if the Patron Presents before the Bishop collates, he is bound to admit his Clerk, because he is only to see that the (a) Church is served, which is now done by the Patron himself.

So 'tis if the Lapse devolves on the *Metropolitan*, and before he Collates the (b) Patron Presents to the Bishop of the Diocess.

So if the Ordinary neglects, and within his Six Months the (c) Archbishop should collate, yet, if within that Time the Patron Presents, his Clerk ought to be received, because the Collation by the *Metropolitan* was wrong, and therefore void against the Patron.

And it was my (d) Lord *Hobart's* Opinion, that the Patron's Clerk ought to be admitted after a Lapse is come from the Archbishop to the Queen; if his *Presentation* is exhibited to the Ordinary before She Presents, because his Right continues till the Title by the Lapse is executed; for he held that a Lapse doth not vest such an absolute Title in the Queen, that She may Present at any Time, for then there could be no such Usurpation upon such a Title, which is contrary to the Judgment in (e) *Beverley's* Case; and if an Usurpation shall be allowed against a lapsed Title to the Queen, certainly the true Patron's Title will prevail; but this must be understood where the (f) Clerk dies Incumbent upon such usurped Title, for the Queen may remove him at any Time whilst he is living.

So where the Parson neglects to read the 39 Articles, one Title shall accrew to the Bishop by Lapse, without Notice given by him to the Patron; and yet my * Lord *Coke* tells us, the Church is void, insomuch that if the Parson libels for Tythes, the Parishioner may plead that he did not read the Articles.

How the Six Months shall be Computed, and from what time.

It hath been a Question how the Six Months shall be computed, in which the Patron and Ordinary are respectively to fill the Church after an Avoidance, that is, whether it shall be by (g) Kalendar or Lunary Months; but 'tis now settled that it must be by Kalendar, viz. 182 Days for Half a Year, because this Computation was made by Churchmen, and this likewise concerns the Affairs of the Church.

(a) 2 Rol. Abr. 367. 1 And. 149. (b) 2 Rol. Abr. 348. Hutt. 24. (c) 2 Rol. Abr. 368, 369. (d) Hob. 157. (e) 1 And. 148. (f) 7 Rep. 28. 2 Cro. 216. * 6 Rep. 29. (g) Yelv. 100. 6 Rep. 61, a. 2 Cro. 166. 2 Inst. 360.

By the Statute of *W. 2. cap. 5.* 'tis enacted, That if the Patron is disturbed for Six Months, so as the Bishop Presents by Lapse, he shall recover Damages to Two Years Value of the Church; and if the Six Months are not passed, and the Patron proves his Title within that Time, then he shall recover Damages to half a Year's Value of the Church.

Now, these different Expressions of Six Months and Half a Year, do not make the Time distinct in Computation, but one expounds the other, *viz.* Where 'tis said that the Disturbance is for Six Months, so as the Bishop Presents by Lapse, &c. that concerns the Prelates, for the Words are properly applicable to them; but where 'tis said Damages shall be recovered to half a Year's Value, that concerns the Laity, and shews how they are to be punished for a Disturbance.

This being the Manner of Computation, the next Question will be, from what Time the Six Months must commence?

And as to that the Law is, *viz.* If the Clerk is deprived, or resigns; the (i) Church shall not lapse till Six Months after Notice thereof, which Notice the Ordinary must give to the Patron, and in such Case the Time shall not be computed from the actual Avoidance; and if the Ordinary should die, his Successor is bound to give the like Notice, for if he will take that Advantage which his Predecessor might do, 'tis reasonable he should perform that which the other ought to have done.

And because a Deprivation *Ipso facto* differs from that which is occasioned by a Declaratory Sentence in the Spiritual Court, therefore by the Statute 13 *Elix. cap. 12.* 'tis provided, That no Title to Present by Lapse shall accrew upon any such Deprivation, but after Six Months Notice given to the Patron by the Ordinary; and it being in the Case of a Penal Statute, the Patron is not obliged to take Notice from any Person, but from the Bishop himself, and it must be Personally, if he live in the same County, and no other Notice is sufficient, *Dyer 369. 1 Leon 31. Cro. Eliz. 119.*

But if the Patron lives in another County than where the Bishop resides, Notice may be published, by fixing the very Cause of Deprivation on the (k) Church-door.

Where the (l) Clerk is refused for Illiterature, there the Six Months shall incur from the actual Avoidance, and not from the Time of Notice given, &c. because a (m) Patron ought to Present a Clerk who is qualified, otherwise his Presentation is void.

(i) Keilw. 49 b. 1 And. 62. 3 Leon. 45. (k) Dyer 346. b.
(l) Dyer 227 b. (m) 4 Mod. 140.

Leases by Ecclesiastical Persons.

AT Common Law, a Bishop, Abbot, Prebend, or any other single spiritual Corporation could not make a Lease for longer Time than he continued Bishop, &c. but then they might make any Estate whatsoever to bind their Successors, so as it was confirmed by the Dean and Chapter.

As the Bishops had too little Power alone without their Chapters, so being joined with them they had too much, and therefore it was thought expedient that the Law should be altered.

The first Statute which made any Alteration in this Case was, *Anno 32 Hen. 8. cap. 28.* which is commonly called the Enabling Statute, because it gave Bishops Power to make Leases of their Lands, which they had in Right of the Church, either for 21 Years or Three Lives, without any Confirmation, which they could not do before.

This Act relates only to Bishops, it did not extend to Parsons and Vicars; they had no Manner of Liberty to make (*n*) Leases otherwise than they might have done before; 'tis true, a Prebendary is within the Equity of it, though he is not seised in the Right of the Church, but of his *Prebend*, and not of an absolute Fee in that neither: 'Tis my * Lord Coke's Opinion in his *Comment* upon *Littleton*, no more than a Parson or Vicar is seised of a Rectory or Vicarage, yet a Prebendary may make a Lease without Confirmation, and so may a (*o*) Chancellor, who had a Rectory, merely as Chancellor, and make a Lease thereof without Confirmation, for he is not *Inter minores ordines qui famulantur Ecclesie*.

But those Leases which Bishops make pursuant to this Act must have these Restrictions,

1. They must be made in Writing, Indented.

2. Every such Lease must be made to commence from the making, or the Day of the making thereof.

And as to this Matter, there is a Distinction when the Lease is made for Years, and when 'tis for Lives; for if tis made for Three Lives *Habendum*, from *Michaelmas* next, 'tis void, because Tythes cannot pass by Way of Reversion, tho' they may by Way of (*p*) Discharge or Reteiner.

This must be intended upon the Act 1 & 13 *Eli.* and not upon the 14th, which enables Clergymen to make Leases of Houses in Towns; for there a Lease to begin from a Time to come is good, so as it doth not exceed the (*q*) Term of 40 Years.

3. If there is an old Lease in being, it must expire, or be surrendered, within a Year after the making the new Lease.

(*n*) 4 Leon. 51. * 1 Inst. 300 b. (*o*) Sid. 158. 1 Lev. 112. Cro. Eliz. 350. (*p*) Yelv. 131. (*q*) Poph. 9.

This must be understood where the Bishop makes a new Lease without Confirmation; for if there is more than a (r) Year in Being at the Time of the making a new Lease, if 'tis confirmed by the Dean and Chapter, 'tis good.

4. There must not be a double (s) Lease in Being at one and the same Time, that is, one for Years and another for Life.

As to (t) Leases made for Three Lives, they must not be to one for Life, remainder to another for Life, &c. but the Lives must all ware together; for if made otherwise, such Leases are voidable.

Neither can a Bishop make a (u) Lease for 99 Years, determinable upon Three Lives; but a Lease to One for Three Lives is good, because 'tis the same in effect as a (x) Lease to Three for their Lives.

5. The Lease must be made of Lands, Tenements, or Hereditaments, out of which an *Annual Rent* may be reserved, and not of Things which lay in Grant, as Fairs, Markets, Tythes, &c.

6. It must be made of Lands which have been usually Let, for the greatest part of 20 Years, next before the making the new Lease.

Copyholds, tho' they are Estates at Will, yet they do not fall under this (y) Restriction because they are usually Let.

My (z) Lord Coke was of Opinion, that if Lands were in Lease for 11 Years next before the making a new Lease, 'tis sufficient, for in such Case it shall be taken to be usually Let.

But Justice *Twissden* was of a contrary Opinion, viz. that the Words must be intended of a longer Time in Lease; for Lands which have been but once Let, and that for so few Years, cannot, in Propriety of Speech, be said to be usually Let.

'Tis true, 11 Years comprehends the greatest part of 20 Years, and so is within that Restriction, but not within the other, of being usually in Lease.

The words may be taken in two Senses, the one for the repeated Act of (a) Leasing, the other for the continuance of the Lands in Lease; and therefore Lands leased many Years before the making the new Lease (tho' but for once) may be said to be Lands usually demised, and this is the received Sense of the words.

So if Lands have been anciently leased for Lives, and afterwards kept in the (b) Bishop's Hands for 20 Years before he makes a new Lease; this seems to be a good Lease to bind the Successor, for the intent of the Law was not to tie

(r) 4 Leon. 78. (s) Cro. Eliz. 440. Moor 253. 5 Rep. 2. *Elmer's Case*. 1 Mod. 204. (t) Cro. Car. 95. 6 Rep. 37. a. (u) 8 Rep. 70. b. (x) 2 Cro. 76. (y) Moor 759. (z) 1 Inst. 44. b. (a) Vaugh. 33, 34. (b) Cro. Eliz. 375. Sid. 416.

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the Bishop strictly to the words of the Statute, but to preserve the ancient Rent, but it must be once demised, otherwise it cannot be known what was the ancient Rent.

And as it must be made of Lands usually Let, so the Lease must contain the usual * Covenants, as in former Leases; as if a Bishop Lets Lands which he hath in Right of his Bishoprick, and covenants for himself to pay the Taxes, this shall be intended only of Synodals, &c. and not Parliamentary Taxes; for if 'tis such a Covenant as hath been usual in Leases of this Nature, then it shall not extend to new Charges; if 'tis a new Covenant, then it shall not bind the Successor, for if it should the Statute 1 *Eli2.* would be of little effect.

7. The *Reddendum* must be so much Rent which hath been usually paid for the Land, within 20 Years before the making the new Lease, and made payable to the Bishop and his Successors.

But if Lands are usually Let for Three Lives, under a certain Fine, and an Heriot upon the Death of every Tenant, and a new Lease is made reserving the yearly Rent, and omitting the Heriots, yet the (c) Lease is good, because an Heriot is a Service, and not properly any *Annual Rent*, or depending upon it.

So if a Bishop grants the next Avoidance, it shall bind the (d) Successor; for tho' there cannot be a Rent reserved out of it, yet 'tis an Hereditament.

And tho' there may be some Variations in former Leases, yet if in the new (e) Lease the same Rent is reserved which was in the very last Lease before it, this shall be accounted the ancient Rent.

There is a very nice (f) Case relating to this Matter, which is thus, The *Petty Canons* of St. Paul's Church made a Lease to *Husband and Wife*, of the Rectory of St. Gregory, rendring 40 *l. per Annum*; and the *Husband* alone covenanted to pay yearly a couple of Capons; but in the last Lease before this there was 40 *l. per Annum* reserved, and a couple of Capons. My Lord *Hales* held this present Lease to be void, because in the former Lease the Capons were reserved, and made part of the Rent, but in the new Lease there was only a Covenant to pay them, which would not bind the Wife if she survived, and therefore it would not amount to a Reservation, which it might have done if both had covenanted; and in this Case a distinction was made between a sole and aggregate Corporation, viz. That if a sole Corporation makes a Lease not warranted by the Statute 13 *Eli2.* it shall bind him, but not

* 2 Lev. 68. 1 Vent. 223. (c) 6 Rep. 38. 2 Cro. 76. (d) Cro. Eliz. 440, 690. (e) *Hardres* 326. (f) *Hardres* 352.

his Successor, but if a Corporation aggregate make such a Lease, 'tis void themselves.

'Tis plain, that by this Paragraph there must be a certain and determinate Rent expressed in the new Lease; and therefore where a (g) Bishop made a Lease, rendring the usual and accustomed Rent to him and his Successors, and not mentioning how much, such Lease is void.

But if a whole Farm should be Let out in Parcels, which had been usually Let together, there a full Rent, *pro rata*, makes the Lease good, because the Successor hath no Prejudice.

The Bishops were enabled by this Act to make Leases for Three Lives, or 21 Years, without any Confirmation by the Chapter; but yet they were not restrained from that ancient and large Power which they had before, in making long Leases with Confirmation: And therefore, *Anno 1 Eliz. cap. 13.* it was enacted, *That all Estates made by Bishops, of any Lands or other Hereditaments, being Parcel of the Possessions of his Bishoprick, or united, or appertaining to the same, other than for Twenty One Years, or Three Lives, from the Time of the making thereof, and whereupon the accustomed yearly Rent, or more shall be reserved, and payable yearly, during such Term of Years or Lives, shall be void.*

Before I shall Treat more particularly of this Act, I must take Notice that there is a difference between (b) Leases made by Bishops *de facto* and *de jure*; for a Lease made by a Bishop *de facto*, tho' confirmed by the Dean and Chapter, shall not bind the Successor, because 'tis a voluntary Act, which he might have omitted without Prejudice, but all Admissions and Institutions by such a Bishop are good. 'Tis to be observed, that this is a private Act of Parliament, for it concerns the Bishops only, therefore it must be pleaded; and likewise, that a Lease made pursuant to this Act, must have all the Restrictions required by the Act 32 Hen. 8. It was made purely for the Benefit of the Successor; and therefore where a Lease made by a Bishop is not prejudicial to his Successor, tho' it want some of those Circumstances mentioned in the Act 32 H. 8. 'tis good; as for instance, if the Lease is of Lands *habendum a datu Indentura*, rendring the ancient Rent, and confirmed by the Dean and Chapter, tho' there were four Years of a former Term then in Being, yet 'tis not void, because there is no Injury done to the Successor; 'tis true, it cannot commence in Interest presently, because the former Lease was not expired, but it commences immediately by Estoppel, so that the Successor will have Two Rents, one in Interest, and the other by Estoppel.

'Tis true, such a (i) Lease is void upon the Statute 32 H. 8. because there was a former Lease in Being; but 'tis not so

(g) Cro. Car. 95. (b) 2 Cro. 152. (i) Moor 107, 293.
4 Rep. 76. 6 Rep. 2. Z 4 upon

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upon this Act 1 *Eliz.* for 'tis capable of a Confirmation, and being confirmed shall bind the Successor.

But no Confirmation will make a double Lease good, that is, where a Lease for Lives is made before a Lease for Years expires, because this Statute is in the Disjunctive, *viz.* *That a Lease shall not be good other than for Twenty One Years, or three Lives*, which shews that both cannot be good at the same Time.

Besides, the *accustomed yearly Rent* must be payable, during the Term of Years or Lives, which cannot be in this Case, for if the (k) the Lessee for Life should enter, the Successor hath no Remedy against him for the Rent, either by Distress or Action of Debt, if the Lease for Years is not expired; and he cannot have any Assize because he never had any Seisin, so that there is a possibility that the Lessee for Life may be forever discharged of the Rent, because he may die before the Lease expires; but if he survive; then the Successor hath a Remedy for the Arrears.

Under this Statute I shall consider,

1. What shall be accounted *Parcel of the Possessions of the Bishoprick.*
2. What shall be taken to be the *accustomed Rent.*

As to the First of these Particulars, there are some *Offices* which may be taken as *Parcel of the Possessions of a Bishoprick*, or at least as appertaining to the same; and tho' the Bishop cannot execute such Offices himself, yet he hath an Inheritance in the Gift and Disposal thereof, and those are ancient Offices which the Bishop may grant with (l) the ancient Fees; and this being confirmed by the Dean and Chapter, is good by the Intention, and within the Equity, though not by the words of this Statute.

But though such Grants are allowed for Necessity, yet they ought not to be accompanied with a new Fee, for that would be some Diminution of the Revenue, and would so far impoverish the Successor; and 'tis agreed on all hands that this Statute was made for his Benefit.

Therefore, if a Bishop is seized in Fee of a Park, and the Keeper had been an ancient Officer there, if the Bishop should grant that Office with (m) the ancient Fee, *nec non cum Pastura pro quibus equis in eodem Parco*, and this Grant should be confirmed by the Dean and Chapter; 'tis void as to the Pasture, because 'tis a new Thing, which was not granted before, and 'tis still doubtful whether it would not make the Grant void, unless it can be taken as distinct Grants, and so to make

(k) 5 Rep. 2, 3. 1 And. 193. Cro. Eliz. 141. (l) 19 Rep. 62.
(m) Bridg. 29. Cro. Car. 37. Lev. 71.

the first good, and the other void against the Successor, as where the (n) ancient Fee hath been increased in a new Grant; in such Case the Grant of the Office is good, and of so much which was the ancient Fee, but it shall be void as to the rest.

And in all (o) these Cases of Fees, it must appear in pleading, that 'tis an ancient Fee; for tho' the Office is ancient, yet if the Fee is not so, the Grant will be void.

And 'tis to be observed, that all these Grants of Offices are to be made as usual before (p) the Statute, therefore a Grant of an *Official* by an *Archdeacon*, or of a *Commissary* by a *Bishop*, is void against the Successor, if granted in *Reversion*, where it was usually granted in *Possession* before the Statute, for these Offices are *Hereditaments*, and belong to *Bishops* and *Archdeacons*, and so are comprehended in the very words of the (q) Statute; and therefore if they were granted in *Reversion*, such Grants may be still made, but then they must be confirmed by the Dean and Chapter.

Some are of Opinion, that a Grant of the Office of a *Commissary* is good but during the Life of the Grantor; for tho' an Ecclesiastical Jurisdiction may be executed by a Substitute, yet his Acts are in Law the Acts of him who deposes him, and he must be answerable for them, and not the Deputy; so that if such a (r) Grant should be good against the Successor, then he must be liable to the Acts of a Person he never deputed, which seems to be unreasonable:

However, (s) the Grant of the Office of *Register* in *Reversion* hath been held good; and that 'tis sufficient Evidence to produce but one Grant thereof in *Reversion* before the Statute, which may be an inducement to believe that it was granted so anciently.

Now, tho' this Statute 1 *Eliz.* saith, That all Grants made by *Bishops*, other than for *Twenty One Years*, or *Three Lives*, &c. and whereupon the accustomed yearly Rent shall be reserved, shall be void; yet a Grant for *One Life* is good, but then it must be of an ancient and necessary Office; for if a *Bishop* had not Power to grant such Offices for the Life of the Grantee, he would be but ill served by Men whose Titles would be precarious; but the Grant of such an Office to One for Life, and afterwards to another in *Reversion*, is void, and so 'tis where the Grant is made to (t) Two for Life: As for instance, the *Bishop of Salisbury* granted the Stewardship of his Mannors to Two for Life, to be exercised by them or their Deputies, and 20 Nobles Fee, issuing out of Lands, Parcel of his *Bishoprick*; this Grant was confirmed by the Dean and Chapter,

(n) 2 Brownl. 237. (o) 1 Brownl. 182. (p) Cro. Car. 258. Jones 263. Winch. Entr. 22. (q) 2 Rol. Abr. 154. Jones 311. (r) Noy 153. (s) Cro. Car. 279. Jones 310. March. 38. Cro. Car. 555. 2 Rol. Abr. 163. Winch. Entr. 22. (t) 10 Rep. 59.

but it was held void against the Successor; for tho' a *Bishop* may grant an ancient Office to One for Life, because of the necessity of such a Grant, yet 'tis not necessary that he should grant it Two for their Lives.

And if it should happen that after such Grant, one of the Lives should die in the Life-time of that *Bishop* who made the Grant, and then the *Bishop* should die, so that there is but one Life in Being against the Successor, yet the Grant is void against him, because it was void when first made, and shall never be good by any Contingency.

But a Grant to One for Life must be confirmed by the Dean and Chapter, because 'tis a Grant at Common Law; 'tis not warranted by this Statute 1 *Eliz.* for that requires it should be for 21 Years, or Three Lives, but a Corporation aggregate may make such a Grant without Confirmation.

Horne, Bishop of *Winchester*, about Four Years after the making this Statute, granted (u) a Rent of 4 l. out of the Manor of *Walsham*, being Parcel of the Possessions of his Bishoprick, to Dr. *Dale*, a Civilian, for his Life, and this was *pro consilio impenso & impendendo*: 'Tis made a Quere in *Dyer*, whether this Lease was void against the Successor upon this (x) Statute; it was agreed to be good against the Bishop himself, but it was held void against the Successor, because it was not a Grant of Necessity, and it was not of an Office, but only a voluntary Act of the Bishop to choose such a Man to be his Council, who might not be approved by his Successor.

What shall be accounted the accustomed Rent.

2. By this Statute the Form of the Lease is directed; but yet if 'tis made in another manner it shall not be void against the Bishop who made it, but only against his Successors, who may affirm such Lease by receiving the Rent.

Therefore, where a Bishop made a Lease of the Advowson of an Archdeaconry (y) for 21 Years, which he had in Right of the Church; this is good against himself, tho' it was not of (z) a Thing manurable, out of which a yearly Rent could be reserved, as directed by the Statute, for it was never intended to restrain the Bishop in Possession; so that he could not do any Act to bind himself or his Lands, during his own Time, for then he could not Lease any Land which had not been usually Let before the making the Statute, but must manure it by his own Servants; neither could he take any Benefit of Wastes, but only the Herbage with his own Cattle.

This was Bishop *Jewell's* Case, who, *Anno* 30 *Eliz.* * made a Lease of a *Fair* for Three Lives, reserving the ancient Rent;

(u) *Dyer* 370. (x) 10 Rep. 61. b. (y) 1 And. 244. Cro. Eliz. 207. 1 Leon 205. (z) Cro. Eliz. 609. 2 Cro. 273. 10 Rep. 60. b. * 2 Rep. 3.

this was good against himself, by way of Contract between him and the Lessee, but the Rent was not incident to the Reversion, therefore the Lease was void against his Successors.

'Tis true, that at the latter end of that Case 'tis resolved, that the Law would have been the same if the Lease had been for 21 Years, but 'tis since ruled otherwise; for if a Lease of Tythes is made for Three Lives, * this is not good against the Successor, because nothing was demised but Tythes, which lie *in Prender*, and no Rent can issue out of them; there is no certain place wherein a Distress can be taken, † nor any Remedy for Rent if it should be denied, for the Successor cannot have an Action of Debt for it, because 'tis a Freehold, nor an Assize, because there is no Land to be put in View. ||

But if it had been a *Lease for Years*, (‡) there the Successor might have an Action of Debt, not upon the Privy of Contract, for he is not in Law privy to the Contract of his Predecessor, but upon the Privy of Estate, for he hath the Reversion; and 'tis for that reason that an Assignee of the Term shall be charged with the Rent, for it is Attendant upon the Term it self.

So that if a Bishop makes a Lease for *Years of Tythes*, rendering Rent, 'tis good against the Successor, because 'tis a Rent which is incident to the Reversion, and goes to him, which it would not have done, if it had been a Lease for *Lives*.

The Statute 32 H. 8. requires that a Lease made by a Bishop must be of Lands *usually Let* for the greatest part of 20 Years, &c. otherwise it shall be void, and the Statute 1 Eliz. gives the Bishops power to *Lease* their Lands generally without mentioning that the *Lease* must be made of *Lands usually Let*, &c. yet it must be made of such Lands, or 'tis void, (a) because this Statute 1 Eliz. requires, that the *accustomed Rent* shall be reserved upon every *Lease*, which cannot be if the Land had not been *usually demised*.

So the Statute 32 H. 8. requires, that if there be an old *Lease* in Being, it must expire or be surrendered within a Year after the making the new *Lease*, all which is omitted in the Act 1 Eliz. but yet a *Lease* made pursuant to it is not good (b) against the Successor, if the old *Lease* doth not expire, or shall not be surrendered within that Time, unless such *Lease* is confirmed by the Dean and Chapter, but if confirmed, then if there is a *Lease* of 21 Years in Being, the Bishop may make a new *Lease* of the same Lands for 21 Years more, to commence from the making thereof, which shall bind the Successor; and these are called *Concurrent Leases*, of which I shall treat particularly hereafter.

* 2 Cro. 111. Moor 778. † 2 Cro. 173. || Hardres 326.
(‡) Raym. 18. 2 Sand. 303, 304. (a) Cro. Eliz. 874, 875.
(b) Bridgm. 30.

But a Grant of the next *Avoidance* is not good, tho' confirmed by the Dean and Chapter, because 'tis not an *Hereditament* out of which a yearly Rent can be reserved.

And it must be out of an *Hereditament*, *Parcel of the Possessions of the Bishoprick*, (c) and therefore if an Archdeacon hath a Parsonage appropriated to his Archdeaconry, and he *Leases* the Glebe for 50 Years, which is confirmed by the Bishop being Patron, and by the Dean and Chapter; this is void against the Successor, because this Confirmation passed no Estate, 'tis no more than an Assent to the *Lease*, *Parcel of the Possessions of the Archdeaconry*, and not of the Bishoprick.

So where the Bishop himself granted to the Mayor and Commonalty of *Winton*, (d) that they might build in the vacant Places of the City and dwell there, which Grant was confirmed by the Dean and Chapter; yet the Soil was still in the Bishop, and his Successors were not bound by that Grant, for it enures only as a License and no more.

Both the Statutes before-mentioned relate only to Bishops, the next concerns *Parsons* and *Vicars*.

Parsons and Vicars.] At Common Law, *Parsons* and *Vicars* might alien their Glebe with the Confirmation of the Bishop and Patron; and they had no Restraint put upon them till *Anno 13 Eliz.* (e) and then an Act was made which is penned almost like the former Acts, and which is a * general Law, for it concerns all the Inferior Clergy, and it requires,

That all Leases or Estates made, done, or Suffered by Masters and Fellows of Colleges, Deans and Chapters, Masters and Guardians of Hospitals, Parsons and Vicars, &c. of Houses, Lands, Tythes, Tenements or Hereditaments, being Parcel of the Possessions of the Church, other than for Twenty One Years, or Three Lives from the making thereof, and thereupon the accustomed yearly Rent or more shall be reserved, and payable during the Term, shall be void.

Upon this Statute it hath been observed, that a *Lease* may commence from the making thereof, whereas by the enabling Act 32 H. 8. it might commence from the Day of the making as well as from the making, &c. likewise that the word *Suffered* (f) was put in to prevent any Alienation by Fine and Non-claim, for, if he doth not Claim, he suffers it to pass.

Leases, made pursuant to this Act, must likewise have the same Restrictions as required by the Act 32 H. 8. but they must be confirmed by those who by Law are to confirm the same.

This Statute (g) hath been construed liberally to prevent all Evasions; for whereas it saith, that *Leases* made by *Masters and Fellows* of Colleges, other than for 21 Years shall be void;

(c) Cro. Eliz. 430. (d) Het. 57. (e) 13 Eliz. cap. 10. * Moor 592. Contra. 1 Mod. 205. (f) 1 Rol. Rep. 171. 11 Coke 66, (g) 11 Rep. 76.

these words shall comprehend all other Names of Corporation, as *Warden and Fellows*, *Warden and Scholars*, and also Colleges which are Temporal, and for the advancement of some Arts and Sciences, as Colleges which are Ecclesiastical, or mix'd.

So where it mentions *Leases* to be made by *Deans and Chapters*, (b) these words extend to a Chapter where there is no Dean.

By a Statute made in the very next Year, (i) the Power of making *Leases* was a little enlarged; for whereas by the Act 13 Eliz. *Parsons and Vicars* could make *Leases* only for 21 Years; now by this other Statute they might *Lease* for 40 Years, but this must be of Houses in *Corporations, Cities, Burroughs, or Market-Towns, or the Suburbs thereof, and Grounds belonging to the same*, so as they are not the Dwelling-Houses of the Parsons themselves, nor have above 10 Acres of Ground belonging to them.

But these *Leases* must not be made *in Reversion*, nor without reserving the accustomed yearly Rent, nor for a longer Term than for 40 Years; and there must be a Covenant to charge the Lessees with Repairs; there must be no alienating such Houses in-Fee, unless Lands of as good yearly Value be immediately purchased and settled on the Church in lieu thereof.

Therefore where the Dean and Chapter of *St. Paul's* (k) made a *Lease* of a House in *London* for 40 Years, which was in *Lease* for 10 Years to another at that Time, this was held void, because it was a *Lease* in *Reversion*, and so within the very words of the Act, which is a general Law, and need not be pleaded.

So a *Lease* made of a House in a Market-Town (l) for 21 Years only, to commence from *Michaelmas* after the Date thereof, there being Two Years of a former *Lease* not expired, this was held to be a *Lease* in *Reversion*, and so void within this Statute, tho' confirmed, because it did not commence on the Day it was made.

Now if a Parson, who is enabled by this Statute to make a *Lease* for 40 Years, doth demise a House for 20 Years, and Eight Years afterwards he makes another *Lease* of the same House, and to the same Person for 20 Years more, this is no *Concurrent Lease*, because the Acceptance of the second *Lease* by the Lessee hath made his first *Lease* void.

And after all, Sir *Simon Degg* tells us, that it hath been a Question, whether a Parson can make any manner of *Lease* to bind his Successor? (m) Because, by a Statute made in the very same Year of the Queen, 'tis enacted, That *Leases* made by *Parsons and Vicars* shall continue no longer than they shall

(b) 1 Mod. 205. (i) 14 Eliz. cap. 11. (k) Cro. Eliz. 564.
(l) 1 Vent. 244. 2 Lev. 61. (m) 13 Eliz. cap. 20.

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be Resident, and serve the Cure *without Absence above 80 Days in any one Year.*

This Question did arise upon a very notable Construction of those Words, *viz.* That every *Lease* made by a Parson should continue no longer *than 80 Days after his Death*, and then to be void, because he had been absent so long from his Cure; and this is called an equitable Exposition of the Statute, it being made for the Advancement of Religion, and to avoid Dilapidations; and we have a Report from Justice *Croke* (n) of a Judgment in Point.

But Serjeant *Moor*, (o) who Reports the same Case, tells us, the Judges were divided in Opinion upon this Matter, but one would wonder what should occasion such a Division; 'tis true, a dead Person can be no longer Resident upon his Benefice, but certainly the *Residence* intended by the Statute must be such, which enables him to serve the Cure, and that can never be intended of a dead Man, neither must he be absent above 80 Days in one Year, but when he is dead, he must be absent for ever; so that *Death* cannot, in Propriety of Speech, be called *Absence*; for a Man cannot be said to be absent, who is not in Being, it must be a voluntary Absence whilst the Parson is living and might return; and for this Reason it has been (p) held, that if he is suspended from his Cure for 80 Days, this doth not make his *Lease* void, because his Absence was not Voluntary.

In 24 *Car. 2.* (q) the same Point came in debate again, and the whole Court agreed, that Death could never be intended to make a Parson Non-resident, so as to avoid any Lease which he had made.

Besides, the Statute inflicts the Forfeiture of a Year's Profit of the Benefice of that Incumbent, who shall absent himself Eighty Days, to be distributed by the Ordinary amongst the Poor of the Parish, &c. which shews that the Law-makers intended to punish a living, and not a dead Man, for such cannot lose a Year's Profits of his Benefice.

This is further explained by a Statute made Five Years afterwards *viz.* Anno 18 *Eliz. cap. 11.* which provides, that if an Incumbent commits any Offence by which he ought to lose a Year's Profit of his Benefice, then within Two Months after Sentence, and Request made by the Churchwardens, &c. the Ordinary shall grant a Sequestration to such Profits to any Inhabitant of the Place; and if he should make Default in collecting it, then every Parishioner may retain his own Tythes.

There is another Question, whether Leases (r) made by Parsons shall be void *ab initio*, after Eighty Days Absence, &c. or

(n) Cro. Eliz. 123. (o) Moor 270. (p) Moor. 448. 6 Rep. 21. (q) 2 Lev. 61. 1 Vent. 244. (r) Dyer 372 b.

only from the Time of such Absence? But the negative Words in the Statute seem to resolve this Doubt, viz. That the Lease shall endure *no longer* than the Incumbent shall be Resident; which imply, that it shall endure so long, and an Action of Covenant may be brought (s) for any Breach within that Time.

Besides, the Statute is, that upon Eighty Days Absence the Lease shall *cease*, which shews that it was in Being till the Parson absented for that Time, otherwise it could not then *cease*.

And in pleading this Matter it must be, that he absented himself Eighty Days & *ultra* (t), and that it was *voluntary*, Cro. Eliz. 100. and Care must likewise be taken that the Statute is truly recited (u).

Upon the whole Matter, a Parson may make a Lease to bind his Successor, so as such Lease is confirmed by Patron and Ordinary; and if he should afterwards be deprived, the Lease is good.

But the Law seems to have left it in his Power to avoid such Lease in his *Life-time*, by a voluntary Absence from his Cure for Eighty Days, and a Confirmation will not help it, because that cannot make a Lease good, which the Law hath made void; and tho' there should be a Covenant in such Lease, that the Parson would not absent himself, &c. and a Bond for Performance of Covenants, yet they are both void: But if the Covenant is, that the Lessee shall enjoy the Lands for a certain Number of Years, if the Parson shall so long live, he doth thereby take upon himself not to do any Act which shall determine the Lease, and therefore, if he resigns or is absent for Eighty Days, an Action of Covenant lies against him (x); but if this Clause is added, viz. *Or as long as he continue Parson there*, in such Case he may resign.

Concurrent Leases.] But an Invention was found out to prejudice the Successor, notwithstanding this restrictive Act 13 Eliz. for Parsons and Vicars would make Leases for Twenty One Years, or Three Lives, long before the Expiration of a former Term (y), and therefore another Statute was made to prevent this Mischief, reciting the Statute 13 Eliz. which declares all Leases void which are made by *Masters and Fellows of Colleges, Deans and Chapters, Masters and Guardians of Hospitals, Parsons and Vicars, or any other, having Ecclesiastical Livings, or Lands, Tythes, Tenements, or Hereditaments, Parcel of their Possessions, or any other Spiritual Promotion, other than for Twenty One Years, or Three Lives, where any former Lease was in being, and not to be expired, surrendered or ended, within Three Years next after the making the new Lease.*

(s) Cro. Eliz. 78. (t) Cro. Eliz. 88. 1 Rol. Rep. 403. 3 Bullst. 201. (u) Cro. Eliz. 490. (x) 1 Brownl. 125. (y) 18 Eliz. cap. 11.

352 Leases by Ecclesiastical Persons.

The general Words of this Statute, *viz. Or any other having Ecclesiastical Promotion* (2) do not comprehend Bishops, because the particular Enumeration of Persons of an inferior Degree, sheweth who are meant, and therefore those general Words shall not draw in a superior Order of Men.

By the Statute 32 H. 8. (a) Bishops may make Concurrent Leases, *without Confirmation* where the old Lease is to expire *within a Year* after the making the new One; and they may make such Leases *with Confirmation*, where more than Three Years of the old Lease are not expired at that Time; but they cannot make a Concurrent Lease *for Lives*, where there is a former Lease *for Years* in Being, *nec e converso*; but other Ecclesiastical Persons cannot make such Leases, unless the former Term is to expire within Three Years, and if so, they may do it without Confirmation.

Of confirming Concurrent and other Leases.

Confirmation of a Lease may be compared to an Attornment of Tenant for Life, or Years, to him in Reversion; for it shews an Assent to a new Lord, only with this Difference, that Confirmation is something more, for that is an Assent coupled with an Interest, because the Patron and Ordinary have a Right in the Thing confirmed; one hath *Jus conferendi*, and both together may charge the Glebe when the Church is not full; they may likewise confirm the Whole or Part, which cannot be done by Tenant for Life, in order to perfect the Grant, for he cannot assent to Part of the Estate granted, but his Attornment must enure to the Whole.

There is an *extra* judicial Opinion in *Moor* (b), *viz.* That if a Lease is confirmed, and then another Lease is made of the same Land, and by the same Person, to commence after the Determination of the first Lease, and then a Third Lease is made to commence presently, and this is confirmed before the second Lease, yet that shall not take Place, for the Confirmation passes no Interest, it only makes the Estate durable and effectual.

Neither will a Confirmation make a Lease good, which wants any of the Qualifications required by the Statute 32 H. 8. both in respect to the Continuance of the Estate, and the Rent, because the restraining Statutes, *viz.* 1 & 13 Eliz. make all such Leases void; so that Confirmation seems only necessary where the Thing demised is not all in Possession, or that the old Lease is not expired, &c.

But since the Policy of the Law hath made Confirmation necessary to perfect some Leases made by Ecclesiastical Persons, therefore where that is to be done, the Law requires it should be by these Persons following.

(2) Goulds. 174. (a) 5 Rep. 2. Cro. Eliz. 141. Moor 253, (b) Moor 66.

1. Leases made by the Archbishops and Bishops must be confirmed by the Dean and Chapter.

They may likewise be confirmed by Deans and Chapters, (c) where there are Two, and the greatest Part *Capitulariter Congregati* shall conclude the rest.

A mere *Commendatory Dean* (d) cannot confirm a Lease; but if he is elected Bishop, and before Consecration doth obtain a Dispensation to hold his Deanry in *Commendam*, such Dean may Confirm.

If the Dean and Chapter (e) confirm any Lease made by a Bishop before 'tis enrolled, such Confirmation is good.

2. Leases made by a *Prebendary*, after he is installed must be confirmed by the *Bishop, Dean and Chapter* (f), unless where the Queen is Patron, and then She and the *Dean and Chapter* are to Confirm, &c. and where the *Bishop* (g) is Patron of the *Prebendary*, his Confirmation alone, without the *Dean and Chapter*, is not good, but only against himself, because the Patronage is Parcel of the Possessions of the Bishoprick; (h) but where the Archbishop is Patron of a *Prebendary*, he may confirm his Lease without the Dean and Chapter.

So where a *Prebend* lying in one Diocese (i) is united or annexed to a *Prebend* in another Diocese, a Lease by the *Prebendary* is good, if confirmed by the Bishop of that Diocese, whereof he is a *Prebendary*, and not by the Bishop where the *Prebend* lies; for tho' the *Prebendary* is inducted by him, yet he owes Canonical Obedience to the other Bishop, of whose Cathedral he is a *Prebendary*.

A *Prebendary* made a Lease for 70 Years (k), and the Bishop, Dean and Chapter confirmed *Dimissionem præd'* for 50 Years, & *non ultra*; yet this Confirmation goes to the whole Term, for the Interest was vested in the *Prebendary*, and the Confirmation was only an Evidence of the Consent of the *Dean and Chapter* to the Lease, and not to the Interest which passed by it, and therefore cannot be apportioned, but if they had confirmed the Land for 50 Years, it had been good for so much and no more.

By which we may observe a Difference where the Confirmation relates to the Estate, as it did in this Case by the Words *Dimissionem Præd'*, and where it relates to the Land it self; for in the one Case it enures to the whole Estate, but in the other only to the Term limited by the Confirmation, and no more.

A *Prebend* was usually lett, excepting the *Crab-trees*; (l) the *Prebendary* made a Lease of it without this Exception, and it

(c) 1 Rol. Abr. 477. (d) Palm. 460. (e) 1 Rol. Abr. 478. (f) 1 Rol. Abr. 481. (g) 1 Rol. Abr. 479, 481. (h) 3 Bulst. 190. (i) Cro. Eliz. 587. 1 Rol. Abr. 479. Sid. 75. (k) Cro. Eliz. 447. 5 Rep. 8. 1 And. 47. (l) 2 Cro. 458. 3 Bulst. 290. *iedm.*

was adjudged that it was void for that very Reason ; for, the *Crab-trees* being not excepted, there was more lett by this new *Lease* than what had been usually demised, which is contrary to the Statute 13 *Eliq. cap. 10.* so that the *Successor* was deprived of the Benefit of those *Trees*, and of the Soil.

One would think, that the Omission of such an unusual Exception should not make the *Lease* void ; for it seems not to be within the intent and meaning of the *Law*, since that was made to prevent Dilapidations, and impoverishing the *Successor*, who probably might have very little Benefit by *Crab-trees*.

But Mr. *Bulstrode*, who reports the same Case, tells us, that the *Lease* was usually made of this Prebend, excepting *Oak*, *Ash* and *Crab-trees*, and there the Omission of such an Exception might be prejudicial to the *Successor*, for want of the Lops of such *Trees*.

3. *Leases* made by Deans must be confirmed by the Bishop and Chapter, unless in the Case of the (y) Dean of *Wells*, and he may make *Leases* without the Confirmation of the Bishop, and only with the Assent of the Chapter ; for the old Deanry was surrendered, which was confirmed by Parliament, and a new Deanry erected ; and the Nomination of the new Dean was given to the King and his Successors, and Power to grant his Possessions, as the old Deans had usually done ; and because they had made Grants thereof without Confirmation of the Bishop, therefore the new Deans might do so too.

The *Lease* of a Dean, (z) who is Sole-seised, may be confirmed by the Chapter.

4. *Leases* made by Archdeacons must be confirmed by the (a) Bishop, Dean and Chapter ; but where the Bishop is Patron it may be confirmed by him alone, *Cro. Eliq. 430.*

5. *Leases* made by Parsons and Vicars after Induction must be confirmed by Patron and Ordinary, but the Confirmation of (b) the Patron shall bind, according to the Estate he hath ; for if he is Tenant in Tail his Confirmation will not make the *Lease* good, without barring the Entail, or discontinuing that Estate, for otherwise the Issue in Tail will avoid it. If Three Coparceners are Patrons, the *Lease* must be confirmed by them all.

The next Avoidance was granted, then the Incumbent made (c) a *Lease* for Years, which was confirmed by the Patron and Ordinary ; and the Church being void, the Grantee of the next Avoidance presented, and his Clerk was inducted, and avoided this *Lease* during his Time ; then he died, and the Patron, who had confirmed the *Lease*, presented another Clerk, and it was adjudged that he should hold it dis-

(y) 1 Rol. Abr. 478. Dyer 273. (z) 1 Rol. Abr. 478.
(a) 1 Rol. Abr. 478. Dyer 239. (b) 1 Rol. Abr. 361. (c) Cro.
Car. 582. Jones 454.

charged of the *Lease*, because the whole Term was evicted by his Predecessor.

'Tis generally agreed, that the Parson who makes (d) the *Lease* must be perfect Incumbent, either upon a Presentation or Collation; for if one enter and possesseth the Glebe without any Manner of Right, and then makes a *Lease*, which is confirmed, yet 'tis void.

Therefore, where the Incumbency is by Usurpation, and the Parson makes a *Lease*, which is confirmed by the Ordinary and the Usurper, and then the true Patron recovers his Right, he shall defeat such *Lease*.

But 'tis not necessary that the very (e) Patron or Ordinary, who had an Interest at the Time of the *Lease* made, should confirm a *Lease*, for 'tis sufficient, if done by the succeeding Patron and Ordinary.

It may seem strange, that if (f) a *Layman* had been inducted to a Benefice before the Statute 13 Eliz. and had made a *Lease*, which was confirmed by the Patron and Ordinary, and then had been deprived, that this *Lease* should be good; but it was so, because he was Parson *de facto*.

If Husband and Wife are Patrons, in Right of the Wife, and they confirm (g) a *Lease* made by the Parson, this shall bind only during the Coverture, for the Act of the Woman was void.

But there is a Difference where any Ecclesiastical Person makes a *Lease* for *Years* and for *Life*; for if 'tis for *Years*, such an Estate in its own Nature is several, and may therefore be confirmed for Part; but when 'tis for *Life*, 'tis entire; and therefore a Confirmation but for a Day is good for ever, that is, during the *Life* of the Person whose Estate is confirmed.

And as the Estate of the Person confirming is to be consider'd, (as before hath been observ'd) so there ought to be some Regard to the Time when 'tis (b) confirm'd; for 'tis absurd to say, as some have done, that a *Lease* may be confirm'd before 'tis made, or even after 'tis made, and before the *Lessee* hath any Interest vested in him by such *Lease*; As for Instance,

If a *Lease* is made to B. for Years, and afterwards the Reversion is granted to C. for Years, and (i) the Dean and Chapter confirms the last *Lease*; some have held that this is good, tho C. had no Estate before the Attornment; but it seems absurd to say, that a Man can confirm or give his Assent to a Thing that is not.

(d) 1 Rol. Abr. 480. (e) 4 Rep. 15. Cro. Car. 376. (f) 1 Rol. Abr. 476. (g) 1 Rol. Abr. 479. (b) Owen 33. (i) 4 Leon. 23.

where the Acceptance of Rent by the Successor will make a voidable Lease good.

The Acceptance of a Rent reserved upon a Lease, which is void in it self without Entry or other Ceremony to make it so, will not affirm such Lease.

And as to this Matter, the Law distinguishes between Leases which are made by those who have an absolute, and others who have (k) a qualified Fee; the first are Bishops, Deans and Chapters; and if they make voidable Leases not warranted by the Statutes, and the Successor accepts the Rent, he affirms the same during his Time, whether the Lease is for *Lives* or *Years*.

But if a Parson or Vicar, who hath only a qualified Fee, makes a Lease for Years, not warranted by the aforesaid Statutes, reserving Rent, and dies, in such Case an Acceptance of that Rent by the Successor will not make the Lease good, because it was void without Entry; but if it had been (l) a Lease for *Lives*, and the Successor had accepted the Rent before he made any Entry to void it; this shall bind him for his Time, because the Lease being for *Lives*, which is a Freehold, cannot be avoided before Entry.

If a Bishop makes a Lease of a Mannor, &c. rendring Rent, but not warranted by the Statutes, and dies, and his (m) Successor commands his Servant to receive the Rent, which he doth, and pays it over to the Bishop; this is a good Acceptance of the Rent to confirm the Lease, because he ought to take Notice at his Peril what Leases his Predecessor made.

And as Acceptance of the Rent will affirm a voidable Lease, so will distraining for it after the Death of the Predecessor, or bringing an Action of Waste against the Lessee.

But the Acceptance of Rent by the Head of a Corporation Aggregate, due on (n) a voidable Lease, will not affirm it; as if a President of a College accept such Rent, this shall not continue the Lease during his Life, because he alone cannot divest the Fellows of their Right.

'Tis generally true, that if (o) a Lease is made not warranted by the Statutes, 'tis void against the Successor, but not against him who made it; and the Reason is, because those Laws were made for the Benefit of the Successor, and not to assist the Possessors; but this must be understood of Leases made by a (p) Bishop, Dean, Parson, or any other sole Ecclesiastical Corporation; for if made by a Corporation Aggregate, then 'tis void *ab initio*; and this was my Lord Chief Justice *Hales's* Opinion.

Lastly, There are Two Ways of making a voidable Lease actually void, &c. By Entry or Claim.

(k) 2 Cro. 173. (l) Het. 83. (m) 1 Rol. Abr. 476. (n) 11 Rep. 79. 1 Rol. Rep. 100. (o) Moor 875. 2 Brownl. 158. 1 Leon. 306. (p) Hardres 326.

The Entry must be where the *Lease* is made of Things manurable or corporeal, as *Lands, &c.* and it may be done by any (q) Person deputed for that Purpose, under Hand and Seal, and it cannot be done by a Bailiff *ex officio*.

By Claim, when the *Lease* for Years is made, reserving Rent upon Condition to be void upon Non-payment, here you must claim the Rent on the Day, to avoid the *Lease*.

I shall now compare these several Statutes together, and shew wherein they agree, and where not.

'Tis plain, they are all made in *Pari Materia*, and that there is such a Coanexion between them, that they have been construed to explain each other.

The first Statute, viz. *Anno 32 H. 8.* is not recited, either by 1 or 13 *Eliz.* yet a *Lease* is not warranted by either of those last Acts, unless it hath the Qualifications and Restrictions required by the Statute 32 *H. 8.*

'Tis expressly requir'd by 32 *H. 8.* that upon every *Lease* there must be so much yearly Rent reserv'd, or more, as hath been usually paid within 20 Years before the making the new *Lease*; the Statutes 1 & 13 *Eliz.* are, that the accustomed yearly Rent, or more, shall be reserved; and herein they all seem to agree, for the Sense is the same, tho' the Words are a little varied.

But by the Statute 32 *H. 8.* such *Lease* must not be *without Impeachment of Waste*, which is not required either by 1 or 13 *Eliz.* yet since Ecclesiastical Persons are restrained by those Statutes from making long *Leases*, they are by the Equity thereof restrain'd also from making *Leases* punishable of Waste.

The Statute 13 *Eliz. cap. 10.* makes no Alteration of the 32 *H. 8.* but leaves it as a Pattern for Ecclesiastical Corporations Aggregate to make *Leases*; such Corporations being not within the Statute 32 *H. 8.* but only sole Corporations; as Bishops, &c.

The Statute 14 *Eliz. cap. 11.* is an Appendix to the 13th, which makes void all Estates granted by Parsons, &c. of Parcel of their Possessions, other than for 21 Years, or Three Lives; but it enlarges that Act as to *Leases*, of Houses in Cities and Corporate Towns, from 21 to 40 Years, so as such *Leases* are made in Reversion, it makes no Alteration of the Statute 1 *Eliz.* and therefore gives no Power to Bishops to make any such *Leases* in Cities and Towns Corporate, other than they might have done by that Statute.

The Statute 18 *Eliz. cap. 11.* which prohibits *Leases* in general to be made in Reversion, where any *Lease* is in Being, and not to expire within Three Years after the making the new *Lease*, hath no Relation either to the Statute 1 or 14 *Eliz.* not to the first, because this Act begins with the inferior Orders of Men, and therefore doth not extend to Bishops, nor to the

(q) Moor 52, Dyer 221. b. 1 Rol. Abr. 514.

4th *Eliz.* because 'tis not recited in it, and therefore that Paragraph, which makes void all Bonds and Covenants, for renewing or making any Leases contrary to the 13th or 18th *Eliz.* doth not extend to Bonds or Covenants for making Leases of Houses in Cities, &c.

What Leases a Parson may make, and for how long.

In former Times there was a Difference made where a Parson leased his Tythes to a Stranger, and where he demised the same to a Parishioner; for if to a Stranger it could not be without Deed, tho' but for a Year, because Tythes cannot pass in Interest, but by Deed; but a Parol Agreement with a Parishioner to be discharged of Tythes was good by Way of Reteiner, and so 'tis now for a Year, (a) but no longer,

But an Agreement in Consideration of Money to be discharged of Tythes, during the Joint Lives of (b) the Parson and Parishioner is not good without Deed, for it founded in the (c) Nature of a Lease; and, as some held the Law then to be, a Parson could lease but for a Year.

But Justice *Yelverton*, who reports this Case, tells us, that he might lease for Years; for such Lease is in Nature of a Personal Composition between the Parson and the Owner of the Land, and good by Way of Reteiner; and if the Parson afterwards sues for the Tythes, a Prohibition will lie upon suggesting this Contract, for the (d) Spiritual Courts cannot take Notice of Contracts; and with this the latter Authorities agree, viz. That a Contract for Years is good, but not since the Statute of Frauds, unless 'tis in Writing, 1 *Lev.* 24.

So that a Parson may make a Lease for Three Years, and from and after the Expiration of that Term for 3 Years longer (e), and so from Three Years to Three Years, during his Life, and this is a good Lease for 12 Years.

So if he make a Lease for one Year, and so from Year to Year, as long as he continues Parson, &c. this is a good Lease for Two Years, and afterwards 'tis an Estate at will.

Leases by Colleges.] By a Statute made 18 *Eliz.* 'tis enacted, That in all Leases made by Colleges in the Universities, and by *Wimton* and *Eaton* College, the Third Part of the Rent shall be reserved in Grain, to be delivered to them Yearly at a certain Day (f), after the Rate of 6s. 3d. for a Quarter of Wheat, and 5s. for a Quarter of Malt, or under; and for Default thereof, that the Lessee shall pay so much Money as Corn of that Kind shall be sold by the Quarter, in the several Markets, in the respective Places of Oxford, Cambridge, Winton and Eaton, the very Mar-

(a) *Godb.* 374. 2 *Rol. Abr.* 63. (b) *Cro. Eliz.* 188. 2 *Leon.* 22. *Owen* 103. (c) 2 *Cro.* 137. 668. *Yelv.* 94. (d) *Raym.* 14. (e) 1 *Rol. Abr.* 850. 1 *Rol. Rep.* 287. 3 *Bullst.* 158. *Co. Lit.* 45. (f) 18 *Eliz.* cap. 6.

ket-Day next before the Rent was due; and all Leases, Bonds and Assurances to the contrary shall be void.

But this Act is not to extend to Leases made by St. John's College in Oxon, of their Mannor of Fifield.

Lecturer. See Preaching.

THE Office of a Minister may be executed by one who hath no Title to a Benefice, and that is, by a *Lecturer*, and 'tis sufficient if such Person is in Deacons Order.

But the Law requires that such *Lecturer* should not only have the Consent of him by whom he is employ'd, but likewise the Approbation and Admission of the Ordinary; and he must likewise at that Time of his Admission subscribe the Declaration and Acknowledgment required by the Statute 14 *Car. 2. cap. 4.* and this he must do in the Presence of the Bishop, and get him to certify it under his Hand and Seal; which Certificate and Declaration he must read within Three Months following, in the Parish-Church where he is to officiate, on some *Sunday*, in the Time of Divine Service, and in the Presence of the Congregation, and if he neglects, he looses his Place.

He must likewise have a License from the Bishop, and must read the 39 Articles in his Presence, and declare his unfeigned Assent to the same; and if he preacheth in the Week Days he must read the Common-Prayer for the Day when first he preacheth, and declare his Assent to that Book, and shall do the same the first *Lecture-Day* in every Month, so long as he continues *Lecturer*; if he neglects or refuses he is disabled to Preach till he conformeth.

And if he shall Preach before he Conforms, he shall be committed for Three Months without Bail, by a Warrant of Two Justices of Peace, the Offence being certified to them by the Ordinary.

In *Michaelmas Term* 15 *Car. 2.* a Bill in Equity was exhibited to recover the Payment of 100 *l.* a Year, which was granted to the Plaintiff by an Order of the Vestry in the Parish of *St. Botolph Bishopsgate*; there was a Defect in the Bill, because all the Parties to the Order were not named in it, and made Defendants; and for that Reason the Plaintiff had no Decree, but the Court was of Opinion, that the Arrears were justly due, and inclined to make a Decree for the Payment, if it had not been for that Defect in the Bill.

Libel.

THIS is a Declaration or Charge drawn up in Writing, in any Action at the Civil Law, to which the Defendant is obliged to answer; and therefore 'tis reasonable he should have a Copy of it, which hath often been denied by Ecclesiastical

ffical Judges : And for this Cause the Statute 2 Hen, 5, cap. 3. was made, by which 'tis enacted, That the Copy of the Libel shall be granted to the Party ; and for this purpose we have a Writ in the Register framed upon that very Statute, directed to the Dean of the Arches (g) or his Commissary, to deliver a Copy of the Libel to the Defendant *Sub pœna Cantum Librarum*.

But the usual Course in such Case is to move the Courts at Westminster for a Prohibition (h) ; and Fitzherbert tells us, the Party may have an Action on the Case against the Judge who refuses it.

Liturgy.

WHEN the Christians were no longer in fear of the Violence and Persecution of the Heathens ; and in that Age when the Church came to be settled, that is, from the Time of Constantine to that of St. Austin, we find there was a Liturgy in the Eastern Church.

The first Cyrill of Jerusalem mentions some Parts of an ancient Liturgy used in that Place, both in respect to the Form of Baptism, and the Celebration of the Eucharist.

St. Basil composed a Liturgy himself, which is to be seen in the *Bibliotheca Patrum*, and in his Book *de Spiritu Sancto* (i) ; and he tells us how the Service of the Church was directed by Rules and Rubricks.

In St. Chrysostome's Time (k), *Omnes unam eandemq; precem concipiebant*, and this was not only a Publick Prayer, but a Publick Form ; for in that Collection of his Works set forth by Sir Henry Savile we find a Liturgy of his own making, which was translated out of the Syriack by Mafius, and used generally throughout all the Greek Churches.

Now, if it should be granted that premeditated Prayers are not required by God in our Private Addresses to him, yet 'tis plain from those Instances already mentioned, such Prayers were always held necessary in the publick Services of the Church ; and this farther appears by the Form prescribed by our Saviour himself, who, when we Pray, commanded us to say, * Our Father, &c. and † St. Matthew tells us, that he went away again, and pray'd the Third Time, saying the same Words.

The Apostolical Canons mention some Set Forms of Prayer, both before and after the Communion ; and St. Basil and St. Chrysostome before-mentioned did not only compose Set Forms themselves, but they ascribe Set Liturgies to be composed by St. Mark and St. James ; and the Adversaries to such Forms have no other plausible Pretence to deny these Authorities, but by alledging these Liturgies to be Suppositious, which is an answer that may serve upon any occasion to evade an Argument, which cannot otherwise be answered.

(g) Rey. 158. (h) Moor 17. F. N. B. 43. (i) Basil *de Sancto Spiritu*, cap. 27. (k) Homil. 18. * Luke 11. 2. † Mat. 26. 39, 42. St.

St. *Ambrose* and *Prosper* (a) tells us, there were Set Forms of Prayers used in the Church in their Time; and they give the Reason for it, *ne in diversum intellectum nostro evagemur arbitrio*; and St. *Hilary* hath this Expression on the 66th Psalm, viz. Let those without the Church hear the Voice of the People Praying within. Now the Word *Praying* of the People must signify something more than the bare Suffrage *Amen*; it must import their joyn't Concurrence in the actual Performance of the whole Duty, which cannot be done but where the Prayers are in a Set Form.

And these are the Prayers which (b) *Isidore* tells us were used in the ancient Congregations of the Christians: And 'tis most certain that such were in use in that great Apostate *Julian's* Time; for *Nazianzen* (c) informs us, that he endeavoured to establish the Heathen Ceremonies in Imitation of the Christian Services, by appointing not only certain Times but *Set Forms of Prayer*.

'Tis true, many of the ancient Liturgies were destroyed by the persecuting Heathens, yet some Fragments of them still remain in the Writings of the Fathers, and are such which are used in our Church at this Day, as the Words before and after the Consecration of the Sacrament are to be found in * *St. Ambrose*, the Question demanded of the Godfathers in the Sacrament of Baptism, viz. *Whether they do in the Name of the Infant Renounce the Devil and all his Works, and the Poms and Vanities of this wicked World*, are to be found in the same *St. Ambrose*; and in † *Tertullian*, the *Gloria Patri*, of which more hereafter is in *Sozomen*, and the Supplement to that * *Doxology*, viz. *As it was in the Beginning*, &c. is to be found in ** *Ireneus*.

In the Sacrament of the Lord's-Supper, the Words pronounced by the Priest, viz. *Lift up your Hearts*, and the Answer, *We lift them up*, 'tis meet and right for us so to do, are to be found in *St. Austin* †† and *St. Chrysostome*, and so are these Words, viz. *The Lord be with you, and with thy Spirit*; and lastly, * *Isidore* mentions the usual Conclusion of all our Collects, viz. *Through Jesus Christ our Lord*, &c.

In the *Western Church* *St. Cyprian* tells us there was a *Liturgy*, viz. in the Church of *Africa*, which is usually accounted amongst the Churches of the *West*; and we find some Pieces of such Liturgies in the same || *St. Austin*; and not only approved by him, who was himself Bishop of that See 35 Years, but by all the Fathers of that Church assembled in a Synod, as it appears by the Canons (y) which they made, and which are men-

(a) Ambr. in 1 Tim. 2. *Prosp. de Vocat.* Gent. Lib. 1. cap. 12.

(b) Isid. Lib. 1. cap. 19. (c) Orat. 3. *versus Julian.* * *De Sacram Lib. 4. cap. 5.* † Lib. 1. cap. 2. *De Coron. Mil.* cap. 3. ** Lib. 1. cap. 1. †† *August. de bono persever.* cap. 13. 1 *Homil. de Pentecost.* * Lib. 1. Ep. 122. || *Epist. 156.* (y) 12 Canon of Council of Milevitis, tione 1

tioned both by *Balsamon* and *Zonaras*, viz. That Prayers be performed by all, and not any to be said in Publick, but only such which have been composed by wise and understanding Men, lest any thing should be vented against the Faith, either through Ignorance or want of Meditation.

Tertullian mentions a *Liturgy* used in *Rome*, which was probably begun by *St. Peter*, for it bare his name; and *Platina* tells us, that several Additions were made to it in succeeding Ages, as by *James Bishop of Jerusalem*, and by *St. Basil* in his Time; And in some Things this Author is very particular, as that *Celestine* added the *Introitus*, *Gregory* added the *Kyrie Eleison*, *Telesephorus* the *Gloria in Excelsis*, *Xistus* the first added *Holy, Holy, Holy Lord God of Hosts*, which is called the *Trisagion*; *Gelasius* the *Collects*, *St. Jerom* the *Epistles* and *Gospels*.

The *Gloria Patri*, which I have mentioned before, was not only appointed by the Council of *Nice* to encounter the *Arrian* Heresy, but it was used long before that Council, even by the Apostles themselves, who were commanded by their Master to baptize in the Name of the Father, &c.

This is found in the Writings of all those ancient Fathers who lived near the Time of the Apostles, as in *Clement*, who was their Scholar, and in *Dionysius* of *Alexandria*; but the following Words which make up the whole Form of the *Doxology*, viz. *As it was in the Beginning*, &c. were not brought into the Church, till the *Arrian* Heresy began to spread, and this was about the Time of the Council of *Nice*.

'Tis true, this began first in the Eastern Church, for which reason I have mentioned it before, and from thence it came to the West, where Pope *Damasus* was the first who appointed it to be used at the end of *David's Psalms*, for those made up the greatest part of the publick *Liturgy* of that Church.

The Churches of *France*, *Spain* and *England* had the like *Liturgies*, tho' not exactly the same.

'Tis true, we have no certain account what Rights or Forms were used here amongst the *Britains*, but *Bede* in his Ecclesiastical History tells us (2), that as soon as the Gospel was planted here, there was a *Liturgy* formed out of the Rituals of the most flourishing Churches then in the World.

For Pope *Gregory* advised *St. Austin* not to follow the *Roman* Office strictly, but to take what he should approve in any Church, and prescribe the same to the *English*, which he did; and this *Liturgy* of *St. Austin* continued for some Ages, till *Osmond Bishop of Sarum*, finding that new Prayers and Offices abounded every where, reduced them all to one Form, and from thence it was called *secundum usum Sarum*.

As to the *Liturgy* now used amongst us, it was composed at the beginning of the Reformation; for the Offices of the Church be-

(2) Lib. 1. cap. 27.

fore that Time consisting in *Missals, Breviaries, Psalteries, Graduals, Pontificals*, and every religious Order having peculiar Rights observed amongst themselves, it was thought proper that the Worship of God should be brought under a set Form; and moreover that nothing should be changed meerly out of an Affectation of Novelty, or because it had been used in Times of Popery, so as it had been practised in the Primitive Times, and such Things only were retained.

This *Liturgy* was confirmed by Act of Parliament, *Anno 1 Ed. 6.* which was repealed by *Queen Mary*, but being reviewed in *Queen Elizabeth's* Reign by some of the reformed Divines, and some small Variations made in it, and particularly in the Rubrick before the Common Service, it was established again by Act of Parliament as we now have it.

Upon the whole Matter, as it would be a very indiscreet thing to address to a Prince in a sudden Discourse without any Pre-meditation of the Form, so 'tis more bold to Petition God publickly in *Extempore Prayers*; for if we would take the Advice of the * wise Man, we should not be so rash with our Mouths, when we go into the House of God, because he is in Heaven, and we on Earth; that is, his Majesty is Sublime, and therefore not to be approached but with great Reverence, nor rashly petitioned by mortal Creatures.

No Argument can be deduced from the unconceived Prayers of the Apostles to evince the Necessity of such Prayers now, because, if at any Time they prayed in that manner, it was by the extraordinary Assistance of the Divine Spirit; but now that Cause is ceased, for no Man will pretend to be illuminated as they were; and as for that Expression in the Epistle to the Romans, (a) viz. *That the Spirit will help our Infirmities, and make Intercession for us*, &c. the meaning is, that the Spirit will direct our Thoughts, which naturally incline to Evil, and will quicken our inward Desires for the true Performance of this Holy Duty; it doth not give us any extraordinary help in our outward Expressions, nay, so far from it that we find in the same Chapter, that the external Effects, attributed to the help of the Spirit, are only Groanings which cannot be uttered.

London-Clergy.

THE Maintenance of the secular Clergy in London before the Reformation (b) did chiefly consist in voluntary Offerings, and *Personal Tythes*, which is part of the Profits arising by the Labour, Art, Trade, or Industry of the Inhabitants; but there being no Law to prescribe the Quantity or Value of such *Personal Tythes*, they were esteemed to be voluntary Oblations, and as such they were received by the Clergy.

* 5 Eccles. 1. 2. (a) Chap. 8. ver. 26, (b) Degg. 256.

This is affirmed by Sir *Simon Degg*; but it seems to me to be a Mistake, for 'tis improbable that the *Law* should settle a Maintenance upon the Country Clergy, and leave those in *London* to be supported by the voluntary Oblations of the People; especially, if we consider that where the Numbers are great there ought to be learned and discreet Ministers to guide and instruct them, and such cannot be had where there is not a sufficient and regular Maintenance to reward their Care and Pains.

Therefore the Clergy of *London* must have a fixed and settled Maintenance long before that Time, which was 52 *Farthings* paid on *Sundays* for the predial Tythes of Houses, and this proportioned according to the *Annual Rents*; for I find, that when *Robert Niger* was Bishop of *London*, which was *Anno* 19 *H.* 3. there was 14 *d.* out of every Noble or Yearly Rent paid to the Clergy, 'tis true, this was more then a Tenth Part, and therefore it could not be *modus decimandi*, as Sir *Simon Degg* imagines it to be, but it was a settled Maintenance for the Clergy there, and probably it was laid in this Proportion on the Rent of Houses as a Retribution to the Clergy, for what might easily be withdrawn from them out of the personal Gains of the People, which ought to be the Tenth Part; but when left to their voluntary Disposition was seldom paid in that Proportion, because it was almost impossible to discover the certainty of their Gains.

I grant, that *Anno* 38 *Ed.* 3. Serjeant *Finchden*, tells us, that in many Places in *London* the Clergy had no other Tythes but Offerings (c), which implies, that in some Places there they had other Tythes; and my Lord *Coke* (d) many Years after him says, that Offerings and Obventions are the Profits of the Clergy in *London*, and not in Corn or any other Manner.

We know 'tis not in Corn, for that cannot be till *seges est ubi Troja fuit*, which I hope never will be, but why not in any other Manner? Probably, because it hath been an Opinion, that Dwelling Houses are not to be charged with the Payment of Tythes (e), there being no Profit arising out of them, but certainly this will not pass for a Reason now, for common Experience tells us, that Houses in *London* are of very great Profit both to Landlord and Tenants.

Now, admitting that Tythes are not due for Houses in the strict Acceptation of the Word, because those are to be paid for Things which naturally grow and encrease every Year, yet they may be due for Houses *nomine & loco decimarum*, and in *Dr. Grant's* Case a Prescription for 2 *s.* in the Pound of the Rent of a House was held good, because it might be a *modus* in lieu of the Tythes of the Land upon which the House was built, and if such Land was Tytheable before the building 'tis unrea-

(c) 38 *Ed.* 3. 13. a. (d) 2 *Inst.* 659. (e) *Corp.* *Eliz.* 276.

sonable that the Improvement of it should discharge the Parson's Right.

'Tis true, we find no Statute-Law for Payment of Tythes in London before 27 H. 8. (f) and then there being some Differences between the Clergy and Citizens about Payment of Tythes, it was referred to the *Archbishop of Canterbury*, the *Lord Chancellor Audley*, and to several other Privy Councillors, who made an Order for the Payment thereof, which was confirmed in that Year by the Parliament; and such Payment was to continue till another Order or Law should be made and confirmed concerning the same.

But that Order being defective in some Expressions, and the Disputes about Payment of Tythes still encreasing, the Clergy and Citizens of London, about Ten Years afterwards submitted themselves to the Order of the same *Archbishop*, the *Lord Chancellor Wriothesley*, and some other Privy Councillors, who made another Decree to this Effect;

That the Citizens should for ever pay to their respective Parsons, for every 10 s. Rent of Houses, Shops, Warehouses, Cellars, and Stables within the City of London, and Liberties thereof, 0*l.* 1 s. 4 d. and for every 20 s. Rent, 0*l.* 2 s. 9 d. and so according to that Rate.

That if any Houses or Shops, &c. should be lett by Fraud, reserving less than the usual Rent, or if a Fine should be taken and no Rent reserved, then the Tenant should pay after that Rate, and according to the Rent which was last reserved for such House; but if it was lett at as great a Rent as it was at the making the Statute, then no Fraud could be averred.

That if a House, &c. is in Lease, and no Rent reserved, then it shall pay after the Rate it was lett at the Time of the making the Statute, but where a greater Rent is reserved, it is to pay according to the improved Rent.

But Houses which were never lett, but always possessed by the Owners, pay no Tythes, this is *casus omissus*, but if ever lett, then after the Rate they were lett at the Decree.

The Tythes in this Case cannot be recovered in the Ecclesiastical Court, because the Statute declares how it shall be recovered.

That the Tenant who lives in the House, and none of his Undertenants shall be chargeable with this Payment.

That if Dwelling-Houses shall be converted into Warehouses, they shall pay Tythes according to the Rate aforesaid
Et e converso

That if a Dyehouse or Brewhouse be lett with the Implements, then a Third Penny of the Tythes is to be abated.

That where a Dwelling House with Shops, Stables, Wharfs with Cranes, Timberyard, or Gardens belonging to the same,

(f) 27 H. 8. cap. 31.

and used together, shall be afterwards severed, that then the Tenants shall pay Tythes according to the aforesaid Rate.

That these Tythes shall be paid Quarterly, at *Easter, Midsummer, Michaelmas, and Christmas*; and that the *Lord Mayor*, by Advice of Council, is to hear and determine Differences arising upon this Decree, and give Costs accordingly.

The rest of the Paragraphs are to be seen in Sir *Simon Degg's* (g) Parson's Councillor, and some Resolutions upon it, viz. that if a Suit is for Tythes in the Ecclesiastical Court a Prohibition will lie, because the Statute directs by what manner they shall be recovered.

But since the Fire of *London* some Alteration hath been made concerning the Payment of Tythes by the Act 22 Car. 2. (b) which provides, that the Annual Rent of Tythes in *London*, whose Churches were demolished or burnt, and which remain single, or are united, shall be,

| | l. | s. | d. |
|--|-----|----|----|
| <i>Albhallows Lombardstreet,</i> | 100 | 00 | 0 |
| <i>St. Bartholomew Exchange,</i> | 100 | 00 | 0 |
| <i>St. Brides,</i> | 120 | 00 | 0 |
| <i>St. Bennet Fink,</i> | 100 | 00 | 0 |
| <i>St. Christophers,</i> | 120 | 00 | 0 |
| <i>St. Dionis Backchurch,</i> | 120 | 00 | 0 |
| <i>St. Dunstan in the East,</i> | 200 | 00 | 0 |
| <i>St. James Garlickbith,</i> | 100 | 00 | 0 |
| <i>St. Michael Cornhill,</i> | 140 | 00 | 0 |
| <i>St. Michael Bassishaw</i> | 132 | 11 | 0 |
| <i>St. Michael Crookedlane,</i> | 100 | 00 | 0 |
| <i>St. Margaret Lothbury,</i> | 100 | 00 | 0 |
| <i>St. Mary Aldermanbury,</i> | 150 | 00 | 0 |
| <i>St. Martin Ludgate,</i> | 160 | 00 | 0 |
| <i>St. Peter Cornhill,</i> | 110 | 00 | 0 |
| <i>St. Stephen Colemanstreet,</i> | 110 | 00 | 0 |
| <i>St. Sepulchre,</i> | 200 | 00 | 0 |
| <i>Albhallows Breadstreet, and St. John united,</i> | 140 | 00 | 0 |
| <i>Albhallows Great and Less united,</i> | 200 | 00 | 0 |
| <i>St. Albans Woodstreet, and St. Olaves Silverstreet</i> united, | 170 | 00 | 0 |
| <i>St. Ann and Agnes, and St. John Zachery united,</i> | 140 | 00 | 0 |
| <i>St. Austin and St. Faish.</i> | 172 | 00 | 0 |
| <i>St. Andrew Wandrope, and St. Ann Blackfryars,</i> | 140 | 00 | 0 |
| <i>St. Antolin, and St. John Baptist,</i> | 120 | 00 | 0 |
| <i>St. Bennet Gracechurch, and St. Leonard Eastcheap,</i> | 140 | 00 | 0 |
| <i>St. Bennet, and St. Paul, Paul's Wharf,</i> | 100 | 00 | 0 |
| <i>Christ Church, and St. Leonard Fosterlane,</i> | 200 | 00 | 0 |
| <i>St. Edmond the King, and St. Nicholas Acon,</i> | 180 | 00 | 0 |
| <i>St. George Buttolph Lane, and St. Butt Billingsgate,</i> | 180 | 00 | 0 |

London Clergy.

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| | l. | s. | d. |
|--|-----|----|----|
| St. Lawrence Jury, and St. Magdalen Milkstreet, | 120 | 00 | 0 |
| St. Magnus, and St. Margaret New Fishstreet, | 170 | 00 | 0 |
| St. Michael Royal, and St. Mary Vintrey, | 140 | 00 | 0 |
| St. Matthew Fridaystreet, and St. Peter Cheap, | 150 | 00 | 0 |
| St. Margaret Pastons, and St. Gabriel Fanchurch, | 120 | 00 | 0 |
| St. Mary at Hill, and St. Andrew Hubbard, | 200 | 00 | 0 |
| St. Mary Woolnoth, St. Mary Woolchurch, | 140 | 00 | 0 |
| St. Clement Eastcheap, and St. Martin Orgars, | 140 | 00 | 0 |
| St. Mary Abchurch, and St. Lawrence Pountney, | 120 | 00 | 0 |
| St. Mary Aldermary, and St. Thomas Apostle, | 150 | 00 | 0 |
| St. Mary le Bow, St. Pancras and Alballows, | 200 | 00 | 0 |
| St. Mildred Breadstreet, St. Margaret Moses, | 130 | 00 | 0 |
| St. Michael Queenbith, and Trinity, | 160 | 00 | 0 |
| St. Magdalen Old-Fishstreet, and St. Gregory, | 120 | 00 | 0 |
| St. Michael Woodstreet, and St. Mary Staining, | 100 | 00 | 0 |
| St. Mary Somerset, and St. Mary Mountbaw, | 110 | 00 | 0 |
| St. Nicholas Coleabby, and St. Nicholas Olaves, | 130 | 00 | 0 |
| St. Olave Jury, and St. Martin Ironmongerlane | 120 | 00 | 0 |
| St. Stephen Walbrook, and St. Bennet Sheerhog, | 100 | 00 | 0 |
| St. Swithin, and St. Mary Bothaw, | 140 | 00 | 0 |
| St. Vedast alias Fosters, and St. Michael Quern, | 160 | 00 | 0 |

Before I mention in what manner the Sums above-mentioned are to be assessed, I shall inform my Reader of a Case which happened *Anno 3 Will.* concerning the Right of Presentation after the Churches were thus united; and this did arise upon a Proviso in the said Act, viz. *That, notwithstanding such Union, each, and every of the Parishes so united, as to all Rates, Taxes, parochial Rights, Charges and Duties, and all other Privileges, Liberties, and Respects whatsoever (other than what are therein mentioned) shall continue and remain distinct, as they were before the making the Act; and that the several and respective Patrons of the said Churches so united shall and may Present by turns to that Church only, which by the Act is appointed to be rebuilt, and established for the Parish Church of the Parish so united, the first Presentation to be made by the Patron of such of the said Churches, the Endowments whereof are of the greatest yearly Value.*

The King was Patron of St. Mary Staining, and a common Person of St. Michael Woodstreet, which was of much greater yearly Value then St. Mary Staining.

Dr. Martin was Incumbent at the Time of the Union, and the Church being void by his Death, the Patron of St. Michael presented one Mr. Crooke; the Words of the Act being, *That the first Presentation shall be made by the Patron of that Church, whose Endowment was of the greatest yearly Value, &c.*

And upon a Caveat put in to his Institution, it was insisted, that the King should have the first Presentation by Virtue of his Prerogative, for he was not bound by an Act of Parliament, in which he was not named; and that there are Two Instances where

where his Presentees were preferred under colour of this Prerogative, tho' his Livings were of less Value.

But if the King is not bound by this Act, for the Reason before-mentioned, it must be by Construction of Law ; and such a Construction shall never be made against the express Words, Sense and Reason of the Law it self: Besides, if he is not bound, he can never Present to St. *Michael*, because he was never Patron of that Church before the Act ; so that 'tis plain he takes a Benefit by the Act, for it gives him a Right of Presentation to a Church, which he had not before ; and if so, it binds him as to the manner of enjoying that Right ; for as his Prerogative will never warrant him to do any wrong or injury to another, which must necessarily follow, if he is not bound by this Act, so it will never enure to alter his Estate, and make it larger than it was given to him by the Parliament: Whereupon Mr. *Crook* had Institution, and enjoyed his Living under that Presentation.

Now, as to the respective yearly Sums above-mentioned, they are to be for the Maintenance of the respective Parsons in *London*, besides the Glebe and other Perquisites.

And here the Aldermen or their Deputies, and Common-Council-men of the several Wards, with the Churchwardens, and one or more of the Parish to be nominated by them, or any Five of them, whereof the Alderman, or his Deputy shall be one, shall assess proportionably on every House and Hereditament whatsoever, except Parsonage and Vicaridge Houses, the said respective Sums, or so much of it as is more than what each Impropiator is enjoyn'd by this Act to follow.

That Persons aggrieved by such Assessment may complain to the Mayor and Court of Aldermen within 14 Days, &c. who, upon summoning the Party grieved, and those who made the Assessment, may determine the same without any farther Appeal.

If the Alderman, Deputy, Common-Councilmen, &c. shall neglect to make any Assessment, being summoned, and required by the Lord-Mayor and Court of Aldermen, or the Incumbent so to do, then the Lord-Mayor and Court of Aldermen may give Authority to any Person or Persons to do it.

The Assessors, within Ten Days after an Assessment made, and Appeals determined (if any such shall be) shall make Three Transcripts thereof in Parchment, and subscribe the same ; one of which shall within 20 Days after such Subscription be given to the Lord-Mayor, another to the Registry of the Bishop of *London*, and the other to remain in the Vestry.

The Sum assessed must be paid at the Four most usual Feasts Quarterly, or within 14 Days afterwards by equal Payment, to commence from such Time as the Incumbent shall begin to officiate.

The Impropiators shall allow what they ought to do before the Fire, and such Allowance is to be part of the Parson's Maintenance.

If the Inhabitants refuse to pay, &c. upon demand at the Premises, the Lord-Mayor, upon Oath of such Refusal, may issue out his Warrant for the Collector, with the Assistance of a Constable, to distrain, &c.

The Lord-Mayor neglecting, &c. to execute the Powers granted by the Act, the Lord Chancellor, or Keeper, or Two Barons of the Exchequer, may, by their respective Warrants, do what the other ought to have done; Where the Parishes are vacant, since the Fire, the surviving Incumbents of Parishes therewith consolidated shall have the like Remedy for Tythes settled by the said Act, as if actually presented into both Parishes since the Union.

That no Court or Judge shall determine any Controversy arising upon the Act, other than the Persons therein authorised.

That the Wardens and Minor Canons of St. Paul's may recover the Duties arising within the Parish of St. Gregory as formerly.

Lord's-Day.

IT was warmly disputed in the last Age, whether,
1. The Sabbath was Instituted at the Creation of the World, and kept by the ancient Patriarchs?

2. Whether there is any Morality in the Fourth Commandment?

3. Whether the Sanctifying one Day in Seven is Ceremonial only?

4. Whether the Lord's-Day was founded on the Authority of the Church, guided therein by the Practice of the Apostles?

It would be very tedious to recite all the Arguments on both sides, I shall therefore give the Reader a short Account of what I think to be the most Material.

It hath been affirmed that God instituted the Sabbath in Paradise, that it was observed by the ancient Patriarchs before it was given by Moses as a Law to the Jews; and this appears from the History of the Creation written by Moses himself, who tells us, *God made Heaven and Earth, and every Thing therein contained*, and finished this Work in Six Days, and that he sanctified the Seventh Day, because he then rested; that is, he ceased to add any thing more to the World thus created by him.

Those who are of a contrary Opinion tells us, that the Jewish Rabbins will not allow this to relate to the very Time when the World was created, or that it was a Command then given to Adam, but that it related to the Time when Moses wrote it, which was many Years afterwards in the Wilderness, and that he mentioned this only as an Example to excite the Jews to keep one Day in Seven Holy, and to enforce his Commands to them for that purpose.

That it was not observed by the Primitive Patriarchs, for *Abraham* himself, with whom the Covenant was made, did not keep any particular Day to the Lord, if he had it would certainly have been mentioned in the Scripture, which is very exact in the History of his Life.

Neither did the *Israelites* keep any such Day whilst they were in *Egypt*, for there they had no manner of Rest from their Labour; they were not so much as suffered to offer any Sacrifice, which had been sooner finished than in the compass of a Day.

They designed to make their Escape from thence; and the better to effect it, they petitioned *Pharoah* to permit them to go Three Days Journey into the Wilderness to Sacrifice to the Lord; but he rather suffered them to Sacrifice in *Egypt*, which *Moses* refused, for fear he should be stoned to Death, because he must have sacrificed Bulls and Rams, Sheep or Oxen, which were the Gods of the *Egyptians*.

Besides, if God had then commanded One Day in Seven to be observed, the Patriarchs would certainly have known it, for they were acquainted with all the rest of his Commandments.

As for instance, they had Knowledge of the first Commandment, by what God spake to *Abraham*:

1. I am God All-sufficient, walk thou before me and be perfect.

2. Of the Second thus, viz. Then *Jacob* went from *Bethel*, to cleanse his House from Idolatry.

3. The Religious making Oaths, as that of *Abraham* with *Abimelech*, shews the Care they had not to take the Lord's Name in vain.

4. The Practice of *Isaac* and *Jacob* shews what Duty Children are to pay to their Parents.

5. *Jacob's* Cursing his own Children for the Slaughter of the *Shichemites*; and the Precept which God gave to *Noah* against shedding Blood, shews that they abominated the Sin of Murder.

6. The Continency of *Joseph*; the Punishment threatned to *Abimelech* for keeping *Sarah*, who was *Abraham's* Wife, shews that Adultery was a Sin.

7. *Joseph's* pursuing his Brethren for the Silver-Cup, which was stolen, shews that Theft was unlawful.

8. *Abimelech's* reproving both *Abraham* and *Isaac* for bearing false Witness in denying their Wives, shews that they were not ignorant of that Law.

9. *Joseph* not coveting his Master's Wife, shews that they held it unlawful to covet another Man's Wife or Goods.

Having thus shewed that the Patriarchs had the Knowledge of the Commands of God, and that the *Israelites* did not observe any Day to the Lord whilst they were in *Egypt*: I shall now shew, that they did not observe it for some Time after their

their Departure from thence; for they murmured against *Moses* for bringing them from thence (as they imagined) to be starved in the Wilderness; but when God sent Quails, and rained down Bread from Heaven, and on the Sixth Day gave them double the quantity they had gathered in any other Day; this was a Preparatory to a strict Observance of the Seventh Day, that they might then rest from looking after their daily Bread; and then *Moses* acquainted them that on the Morrow should be the Rest of the Holy Sabbath unto the Lord; and then also God descended on Mount *Sinai*, and proclaimed the *Decalogue* to the People in Thunder and Lightning.

About Four Years after this Law was given, a Man was taken gathering Sticks in the Wilderness, and he was ordered by *Moses* to be stoned to Death; this was to strike a Terror among the *Jews*, the better to enforce their Obedience to the Law for the future.

Afterwards when they came into the Land of *Canaan*, we do not read of any Duties which were to be performed on the Sabbath-Day by the Priest in Conjunction with the People; for that which was required of the Priest in order to the Sanctification of that Day, was to sacrifice Two supernumerary Lambs of a Year old without Blemish, more than the Two which were the daily Sacrifice; as also to prepare and place Twelve Peck-Loaves before the Lord, that is, one for every Tribe, and this was called the *Shew-Bread*.

Now, tho' the People rested, the Priest had work enough on this Day, but he was excusable, because it was directed by God.

That which was required of the People was only to rest from Labour, in imitation of God's Rest after he had finished the Creation; but the Scripture doth not mention how that Time of Rest was to be employed, nor in what Contemplations, or other Acts of Devotion, for that was left to the Authority of the Church.

'Tis true, the Priests offered Sacrifice for the People, but they might do it without their being present. And when *Moses* delivered the Law into their Hands, he did not appoint them to read it to the People every Seventh Day, but every Seventh Year.

Ezra, who was a Priest, and Learned in the Law of *Moses*, was the first who read the Law on the Sabbath, and this was about 90 Years after the Return of the *Israelites* from the Captivity of *Babylon*.

Thus the keeping a Sabbath is no part of the Law of Nature, because it was instituted by *Moses*; and 'tis not like those Precepts which are naturally ingrafted in the Minds of Men, as, *Thou shalt not Kill, Steal, or commit Adultery*, for all these had been Evil without a Prohibition.

It cannot be denied, but that 'tis agreeable to the Law of Nature to observe some peculiar Time for the Service of God: This was done by the *Hebrews* before the Law, when all Days were alike; but 'tis almost impossible for us to know whether on the First or Seventh Day, after such a Circulation of Weeks as have been since the Creation of the the World, or even since the Birth of our Saviour; for the *Jews* never divided their Time by Weeks till they came out of *Aegypt*, nor the *Romans* till Christianity got footing in the Empire, which was about 520 Years after our Saviour was Born; so that the keeping the Seventh Day holy rather than any other Day must be attributed to a positive Law, and not to any Divine Authority.

2. The Fourth Commandment is Moral as to the Duty, but Ceremonial as to One Day in Seven; and this was the Opinion of *Aquinas* and the Schoolmen: It differs from all the rest of the Commandments, which are Moral, which is thus proved;

God never commanded any thing to be done contrary to the Law of Nature, unless it was to try the Faith of a Person, as in the Case of *Abraham*; but the Sabbath hath been broken by the exprefs Command of God himself, as in the Case of the Children of *Israel*, whom he commanded to besiege *Jerico* on that Day; then the Priests blew their Trumpets, the People shouted, and the City was destroyed.

And not only upon this extraordinary Occasion, but this Day was also broken by the publick and open Practice both of the Priest and People, in the common and ordinary Course of Nature; as in the Case of Circumcision, which, tho' a Sacrament, was a bodily Labour; for if a Child was born on the Seventh Day, he must be circumcised on that Day, and then a Seat must be prepared to hold Two Persons, which was to be covered with rich Carpets; in one Seat the Sureties were placed with the Child, and in the other the Circumcisor; then came a Person with a great Torch, about which were Twelve lighted Wax-Candles; then Two Boys with Cups of Red-Wine to wash the Circumcisor's Mouth after he had done his Work, another carried his Knife, another a Dish of Sand, in which the Foreskin was to be cast, another a Dish of Oil, in which were Clouts of Linnen to be applied to the Wound, and some other Person with Spices and strong Wines to refresh the People; this was only Preparatory to the Act it self, which was very troublesome, and all this was bodily Labour.

When our Saviour was born, the Custom was to read a Section of the Law every Sabbath-Day, out of the Five Books of *Moses*, which was divided into 54 Parts, and the Priest expounded upon it, and this way of keeping that Day was countenanced by his Presence; but when the *Jewish* Nation was destroyed, this Custom was no longer observed.

But

But neither our Saviour or his Disciples did ordain another Sabbath, for it was the Church which did it to commemorate his Resurrection, by setting a-part that Day on which he arose to Holy and Religious Purposes; for when Christ said, *Pray that your Flight be not in Winter, neither on the Sabbath, &c.* it was spoken to the *Jews*, and not to his Apostles, for they were all gone from *Jerusalem* before the Wars of *Titus* and *Vespasian*.

That the descending of the Holy Ghost upon the Apostles on the *Feast of Pentecost*, which happened that Year on a Sunday, was no manner of Evidence that the Day was to be dignified as a Sabbath, because it was a removable Feast, and it was a casual thing that it happened on that Day.

The Preaching of *St. Peter* on that Day, and Baptizing 3000 converted *Jews*, seems to be a better Proof that the Apostles then begun to set a-part that Day for Religious Purposes, if they had not done almost the same thing every Day; for since the Lord added daily to the Church such as should be saved, certainly the Means of their Salvation was administered every Day.

But I shall no longer insist on these Disputes, whether the Sabbath was observed by the *Jews* as a Moral Precept, and so became eternally binding, or whether it was abrogated with the whole Ceremonial Law at the Destruction of the Temple, whether it was instituted by our Saviour, and commanded by his Apostles, or enjoined by the Authority of the Church, by the voluntary Consecration of it to pious Uses, and the Observance of it enforced by the Laws of Princes, by the Canons of Councils, and Decretals of Popes, and other Prelates.

I shall only say, that 'tis the general Opinion of the Reformed Divines, that the Lord's Day was founded on the Authority of the Church.

That as to us here in *England*, all Sundays, and the great Festivals, were observed by our Ancestors the *Britains*, and we find that in the Time of the *Saxons*, King *Ina* made a Law, that if a Servant worked on the Lord's Day by the Command of his Master, it was a sufficient Cause to discharge him from his Service, and to make him Free; but if he worked without such Order, the Servant was to be whipped: So if a Freeman worked on that Day he was to be made a Bondman, or to pay 60 s.

King *Alfred* after him made a Law, that Freemen should enjoy their Liberties on the Lord's Day, and certain Holidays.

When the *Danes* had subdued the *Saxons*, *Canutus* made a Law at *Winchester*, that there should be no Market nor Hunting, nor any meeting of the People for Civil Affairs on that Day, unless in Cases of Necessity.

Yet in the Time of the *Normans*, Markets were generally held on the Lord's Day, and Ecclesiastical Synods, and Councils for State Affairs, and so they are still.

But when *Stephen Langton* was made Archbishop, which was in the Minority of King *John*, it was decreed in a Council held at *Oxford*, Anno 1222. that Sunday should be observed with all Reverence, and no Servile Work should be done on that Day, only Tillage and Sailing were allowed, if occasion required.

About 130 Years afterwards, in a Synod held by Archbishop *Islip*, it was decreed there should be a general Restraint from all manner of Work on Sundays.

But notwithstanding these Restrictions and Decrees, Fairs and Markets were still kept on that Day, and usually in the Church-yards, where they are kept in many Places at this Time, and particularly that great Fair held every Year at *Bristol*, on *St. James's Day*, is kept in *St. James's Church-yard*.

The first Restraint of keeping Markets and Fairs on Sunday was Anno 28 Ed. 3. cap. 14. in which Year a Statute was made, enacting, That Woolls might be exposed to sale at the Staple every Day in the Week, except Sunday.

The like Restraint was made by the Act of Parliament, Anno 27 Hen. 6. cap. 5. upon Pain to forfeit the Wares exposed to sale in such Fairs, &c. to the Lord of the Franchise.

But tho' Markets and Fairs might not be kept on Sundays, yet People might expose Goods to sale in their Shops on those Days; and therefore, Anno 4 Ed. 4. cap. 7, a Statute was made to prohibit Shoemakers in *London*, or within Three Miles round that Place, to sell any Boots or Shoes on the Sabbath-Day, which implies that they might be sold elsewhere.

Anno 5 & 6 Edw. 6. cap. 3. a Law was made that all Sundays in the Year should be kept holy: 'Tis true, this Law was repealed Anno 1 M. and stood repealed all Q. *Elizabeth's* Reign; but by an Act made Anno 1 Jac. cap. 25. that Statute was repealed, but the Act 5 & 6 Edw. 6. was not revived by express words, for that reason it was questioned whether it was in force; but the Law seems to be, that where a (a) Statute, which repeals another, is repealed it self, it makes the first Act which was repealed still in force.

By the Statute 1 Eliz. cap. 2. no distinction is made between Sundays and Holidays, for all Persons are enjoined by that Act to resort to their Parish Churches, or upon let thereof to some other Church on those Days.

Anno 1 Car. 1. cap. 1. all concourse of People out of their own Parishes, for any Pastime, was prohibited on this day; as also Bear-baitings, Bull-baitings, Enterludes, common Plays, and all other unlawful Pastimes.

The Prosecution was to be in one Month after the Offence, the Forfeiture was to be 3 s. & 4 d. to the use of the Poor where the Offence was committed; and the Conviction was to be by

(a) 2 Inst. 686.

View of the Justice of Peace, or chief Officer in a Corporation, or by the Confession of the Party, or by the Oath of one Witness before such Justice, &c. or Officer; and it was to be recovered by Distress, &c. by Virtue of a Warrant from them, respectively directed to the Churchwardens or Constable of the Parish; and if no Distress could be taken, then the Offender was to be put into the Stocks Three Hours.

By the Statute 3 *Car. 1. cap. 1.* Carriers and Drovers are prohibited Travelling on the Lord's-Day, under Penalty of 30 s. and Butchers killing or selling Meat forfeit 6 s. & 8 d. The Conviction, the Levying, the Forfeiture, and the Employment thereof, are the same as in the Statute 1 *Car. 1.* except in the Proof, and that must be by two Witnesses, and the Forfeiture is to be recovered in the Sessions, &c. and the Justices may allow the Prosecutor Part thereof, but not above the Third Part, and the Prosecution must be within 6 Months after the Offence.

Anno 39 Car. 2. cap. 7. it was enacted, That all Laws in force concerning the Observation of the Lord's-Day should be put in Execution, and that all Persons should on every Lord's-Day exercise themselves both publicly and privately in Duties of Piety; and that no Person should do any worldly Labour or Business on that Day, (Works of Charity and Necessity only excepted;) and all of the Age of Fourteen Years and upwards, offending in the Premises, were to forfeit 5 s. and no Person is publicly to cry or expose any Wares to sale on that Day, on pain to forfeit them.

Butchers, Drovers, Higlars, Horse-Courfers, Waggoners and their Servants, are prohibited to Travel on the Lord's-Day, on pain to forfeit 20 s. Wherry-men and Boat men are likewise prohibited, unless allowed by a Justice of Peace or Head-Officer; the Forfeiture is 5 s.

The Conviction is more easy than by the former Statute; for 'tis to be before a Justice of Peace, or Head-Officer of a Corporation, if the Offence is committed there, either upon his own View, or by the Confession of the Party, or Oath of one Witness; and the Penalty is to be recovered by a Warrant from the Justice, directed to the Churchwardens or Constable, to distress the Offender's Goods; and if no Distress can be had, then he is to be put in the Stocks for Two Hours.

The Penalties when recovered are to be for the Use of the Poor where the Offence was committed, except so much thereof as the Justice of the Peace shall think fit for the Reward of the Informer, which is not to exceed a Third Part.

But Cooks and Inn-keepers may dress Meat on Sundays, and People may cry Milk before Nine of the Clock in the Morning.

The Prosecution upon this Act must be within 10 Days after the Offence.

And tho' by the Statute 1 *Will.* a Toleration is given to some Persons to absent themselves from their Parish-Churches, yet

none of the Acts before-mentioned for the Observation of the Lord's-Day were abrogated or repealed, but are still in force; and Persons may be punished for not coming to their Parish-Churches on that Day, unless they go to some Congregation tolerated by that Act.

From all which we may see, that it hath been under the Consideration of several Parliaments to suppress all manner of Prophaness on the Lord's-Day, which doth generally arise either from *Covetousness* or *Licentiousness*.

And therefore selling Goods, keeping Fairs or Markets, and travelling about worldly Occasions, are prohibited on that Day; all which Things are usually done out of a covetous Desire of some Profit or Gain.

And meeting together in other Parishes for Sports, Bear-baiting, Bull-baiting, Stage-Plays, and other unlawful Games, were prohibited, because such Pastimes tend to all manner of Irreligious Licentiousness to debauch the People in their Morals, and to introduce a Contempt of Religious Performances, and of the Service of God.

But by the Common Law, as well as by the Statutes, there is a due Observance to be given to the Sabbath; for *dies dominicus non est juridicus*, Mr. Fitzherbert (b) tells us, that no Plea shall be holden in *Quindena Pascha*, because 'tis always on a Sunday, and 'tis Error if a Writ (c) should bear *Teste* on that Day.

By those Statutes (d) likewise, if any Person travelling on a Sunday is robbed, the *Hundred* shall not be charged with the Robbery, neither shall any Process be served except in Cases of Treason, Felony, or Breach of the Peace, but such Service shall be void, and the Person serving the same shall be liable to Damages, as if he had done it without any Warrant.

Marriage.

MARRIAGE is one of the Rights of Humane Nature, it was instituted in a State of Innocence, and therefore I cannot see any reason why it should be forbidden to the Clergy; for if such a State of Life would have obstructed them in any Divine Performances, 'tis reasonable to imagine that it would have been prohibited by the Mosaical Law, which was so far from any such Prohibition to the *Jewish* Priesthood, that even the High-Priest himself was to be a married Man, for otherwise the Priesthood could not lawfully descend to his Issue, which was positively ordained by God himself.

In the Gospel Dispensation we find that Christ did not prefer any of his Apostles before St. Peter, who was a married Man, neither did he charge any Man to forsake his Wife. St. Paul

(b) F. N. B. fol. 17. (c) Dyer 168. (d) 29 Car. 2.

tells us, it was an honourable State in all, and that every Man should have his own Wife; which are general words, and not exclusive of the Clergy: And Celibacy is no where proposed as a necessary Qualification for a Man in Holy Orders, but on the contrary, that a Bishop || must be blameless, the Husband of one Wife, vigilant, sober, of good Behaviour, &c. Which Text of St. Paul is so far from a Prohibition, that some have taken it to be an absolute Command to a Bishop to marry; for the Terms which denote his Marriage are as much govern'd by the word *Must*, as those which denote his Vigilancy, Sobriety, blameless Life, &c. But it would be absurd to take that Word in the literal Sense, for then a single Man would be excluded from Episcopacy; 'tis only a Prohibition of Polygamy, and that he should not put away his Wife without good Cause, and marry another, both which things were common among the Jews and Heathens; 'tis therefore a Permission to a Bishop to marry one Wife; but the word *Must* has not the same Signification in the latter part of the Verse, for no Man can imagine that the Apostle intended a bare Permission to Ministers to be Sober, Just, and Vigilant; for in respect to those Vertues, that Word implies a Command, and 'tis more tolerable to take the first part of the Text to be so too, than to forbid Marriage to the Clergy, for that would be to abrogate the Word of God it self.

And as for the Custom in the Primitive Times, 'tis plain that the Son hath succeeded the Father in several Bishopricks, which he could not do unless his Father was married; as for instance, * Polycrates succeeded his Father in the See of Ephesus; Gregory Nyssen and Nazienzen, and his Son, were all married Men: 'Tis true, † Baronius tells us they were married before they were ordained, and afterwards they entered into a Vow to abstain from their Wives; but || Socrates proves this to be a Mistake of that Cardinal, because there was no Law at that Time to compel them to such Abstinence; and that several Bishops married and had Children after they were consecrated.

I grant, that in the great Council of Nice some Bishops were of Opinion, that if any of the Three Orders of the Clergy married before Ordination, they should abstain from their Wives afterwards; but Paphnutius, who was both a Bishop and a single Man, prevented the passing any such Decree, and told them it was too heavy a Burthen to be laid on the Clergy.

'Tis true, they are since prohibited by the Laws of the Church, but 'tis by assuming a Power which the Church never had; for, as it hath been observed, it was never forbidden by our Saviour, who planted the Christian Church; and, as a learned Prelate tells us, he best knew what Humane Nature was able to bear; and that if Celibacy had been necessary, he would have requir-

|| Tim. iii. 2. * Eusebius, Lib. 5. cap. 23. Fol. 142. † Anal. Tom. 3. Fol. 634. || Hist. Lib. 5. Fol. 698.

ed it of those to whom he gave Commission to Preach his Gospel: And certainly his Disciples and the Apostles required a greater Freedom from the Cares of a married Life, than what is necessary for those who succeed them after the Church was in a settled Condition. It cannot be denied but that *Celibacy* hath been preferred to Marriage, and that God cast our first Father into a Sleep before he presented him with a Wife; from which some Men have raised this Moral, that if the Eyes of our Minds were open enough to see the Inconveniences of *Marriage*, no Man would clog himself with that Incumbrance, especially the Clergy, because 'tis very difficult for a studious Man to divide his Thoughts between a System of Divinity and a Wife; 'tis plain there is no manner of Conformity between Ink-horns and Cradles, Books and Spinning-wheels; the Noises which are made by such Utensils, accompanied with the wild Notes of a Nurse, and the crying of a Nest of Ministerial-Brats, may disturb even a serious Man from his pious Meditations, and make him the less capable of those Divine Offices which he should daily perform. And it may be for these Reasons, that in the first Ages of Christianity the *Nicholaitans*, the *Gnosticks*, *Montanus*, and other Hereticks, condemned the Marriage of Priests; tho' the Fathers who lived in that Age tell us, it was a Device of the Devil to advance his Kingdom by Fornication and Uncleaness; and they constantly asserted, that it was lawful for all Men to marry without distinguishing between the Laity and the Clergy.

But when the Papal Power encreased, and the Clergy were generally engaged to support it against the Civil State, then were Canons made against Marriage; not that it was unlawful in it self, but it was to separate them from the Civil Society, knowing they would have less regard for the State when they gave no lawful Pledges to support it.

Gregory VII. who was called *Hildebrand*, and who was a very wicked Pope, renewed the ancient Decrees against married Priests; and ordered those who were in that State, either to put away their Wives, or that they should be deposed themselves; and that none should be admitted to the Priest-hood, but such as should promise to live in perpetual *Celibacy*.

The Clergy generally opposed those Decrees as contrary to the Word of God, which tells them, *'Tis better to Marry than to Burn*, and therefore they were more willing to renounce Priest-hood, than to forsake their Wives; and since he was resolved by violent *Exactions* to stop the very *Course of Nature*, they desired him to provide *Angels* to govern the *Chur.ches*, having no longer occasion to make use of Men for that purpose.

But though such Canons were made against the Marriage of Priests, yet they were never received here, but only in *Italy* and *France*, for the *British* Clergy had Wives, but they went veiled; and when the *Saxons* ruled here, most of the Clergy were married; but when *St. Dunstan* had got King *Edgar* on his side to
favour

favour the Monks, then he pressed the married Clergy to leave their Wives, which they refusing were deprived, and the Monks put in their Benefices; who invented this Story, viz. That those married *Persons* who disobeyed St. *Dunstan's* Order, were, with their Wives and Children, transformed into Eels, from whence the Isle of *Ely* took its Name; and this I take to be as credible a *Metamorphosis* as any in *Ovid*. There was another Monkish Story of this Nature about the same Time, viz. That at a Synod held at *Winchester* under that St. *Dunstan*, a wooden Cross gave its Suffrage against married Priests, upon which occasion we have these Verses,

*Humano more crux præsens edidit ore,
Calitus efflata quæ prospicis hic subarata,
Absit ut hoc fiat & cætera commemorata.*

But 'tis certain, that the Priests did keep their Wives long after the Conquest; for at a Synod held at *Westminster*, about the Third Year of *H. 1.* where Archbishop *Anselme* presided, a Canon was made, prohibiting all Priests to marry, or to keep a Wife tho' married.

Henry, Archdeacon of *Huntingdon*, made this Observation upon that Canon, viz. That it might seem very pure to some, but as dangerous to others; for those Priests, who were not able to contain, would by this means fall into horrible Uncleaness, to the great Disgrace of the Christian Religion.

Ralph, Bishop of *Rochester*, who succeeded *Anselme*, did not concern himself in this Matter; but Cardinal *Crema*, who about that Time was sent hither by Pope *Honorius*, as his *Legate de Latere*, held a Synod at *London*, in which he made very severe and investive Speeches against the married Clergy, telling them that it was a horrid Sin for a Priest to rise from a Woman and immediately to make the Body of Christ; and the next Day after he made this Speech, he said *Mass* himself, and at Night was taken in Bed with a Whore.

This Story is delivered to us by the Writers of that Age, and we have no reason to question the Truth of it; for *Henry* of *Huntingdon*, who lived at that Time, and who was a Priest himself and the Son of a Priest, gives a large Account of this Matter, and concludes, that it was too notorious to be denied.

Two Years afterwards another Synod was called at *London*, where some Canons were made to enforce those concerning the Celibacy of the Clergy; and Two Years after that, another was held at *Westminster*, where it was decreed, that Priests should leave their Wives before the next St. *Andrew's* Day, or be deprived.

But the Clergy being unwilling to comply to this Decree, the Execution thereof was left to the * King, who took Mo-

* Hen. 1.

ney of several Priests by Way of Commutation, and so permitted them to live with their Wives, and by this Means that Constitution was in a Manner set aside.

By these Canons there was a stricter Obligation upon the Regulars than upon the Secular Clergy, because they had vowed Chastity; and therefore my Lord Cole (a) tells us, that if a Deacon or Secular Priest had taken Wife, the Marriage was not void, but voidable *causa Professionis*; and if they had Children, and either Husband or Wife had died before a Divorce, such Children should inherit; but if a Monk or Nun had married, it was void, because they had vowed Chastity.

But the Incontinency of the Priests was so notorious, that about 46 Years after the last Canon was made concerning the Celibacy of the Clergy, which was Anno 25 H. 2. Richard, Archbishop of Canterbury, in a Synod held at Westminster, prohibited Men in Orders from keeping Concubines, as well as from Marriage; and the like was done Anno 7 R. 1. by Hubert, Archbishop of Canterbury, and then Chief Justice of England, who presided in a Synod for that Purpose, held at York.

Anno 9 H. 3. Stephen Langton revived those Decrees, and added a Punishment to the Concubines of beneficed Priests, and of Men in Orders; not when they were living, but after they were dead, viz. That they should not have Christian Burial, unless they had repented, and that the Priests should not be admitted to the Sacraments so long as they kept such Women.

But notwithstanding these Constitutions, several of the married Clergy still kept their Benefices till Cardinal Otho, in the Beginning of the same King's Reign, viz. H. 3. made a Positive Canon, that such Priests should be *ipso jure privati*, that their Wives and Children should have no Benefit of their Husbands or Fathers Estates, which were gotten during the Time of such Marriage; but that the same should be vested in the Church where they resided, and that their Children should be disabled to take Orders without a Dispensation.

And thus it continued for almost 300 Years, viz. Till the Reign of H. 8. in all which Time such scandalous Crimes were committed, that Dispensations to keep Concubines were very common, if the Priests had Money enough to purchase them; but lest they should give a bad Example to People, they kept these Concubines not in their Houses, but privately; for there was a Canon made against those, *Qui in domibus suis Concubinas publice detinent, eas a se removeant infra Mensam*; and this made them take Lodgings for them, which occasioned the making another Canon, that they should not have publick Access to them there; *Cum scandalo*.

But afterwards this Crime was so common that few People took any Notice of it, insomuch, that when Pareus, one of the first

(a) 2 Inst. 687.

Reformers, was married; his * Son tells us, that *portenti simile habebatur Matrimonium Pastoris Ecclesie, eo loci ubi nunquam nisi sacristiculorum Concubinas, coquillas & scortilla viderant.*

It must therefore be a very impertinent Reproach to the Monks who favoured the Reformation, as *Langius* and some others did, that they were willing to throw off their Cowles that they might marry the Nuns, when it was so common in those Days to lie with them without marrying; and because the Vow of Celibacy was so seldom observed, Sir *Simon Degg* justly remarks, that it was wisely done by the *French* and *German* Laity to sollicite the Council of *Trent*, that Priests might be tolerated to marry, as being unwilling to trust their Wives and Daughters at Confession with Men who might have Concubines, but no Wives; and that Pope *Pius II.* affirmed there were many good Reasons against the Marriage of Priests, but none which could stand in Competition with those Reasons which were for it; amongst which, this may pass for one, that even at this Time the Vow of Celibacy hath caused so many Disorders in *Spain*, that both the Secular and Regular Clergy walk armed in the Streets in pursuit of their Lusts, and if opposed by the Civil Officers, they fight with so much Fury that they are afraid of them.

But I do not find that the Priests in those Days were reformed by those Canons, therefore *Anno (b) 1 H. 7.* it was thought requisite to add a Temporal Law to those Spiritual Decrees, in order to publish their Incontinencey; and it was, *That the Ordinary might commit such Priests to Prison during Pleasure*; and this Law is still in force.

About 55 Years afterwards (c) an Act was made to declare it Felony for a Priest to marry, or, if married, carnally to know his Wife, or so much as publicly to converse with her; or for any Person to preach or affirm that it was lawful for a Priest to marry.

But the Punishment by Death was thought too severe, therefore in the very next Year (d) it was repealed; but it was then Enacted, That if a Priest was guilty of *Incontinencey* he should forfeit all his Goods, &c. and all his Spiritual Promotions except one; and for the second Office (being convicted) he should forfeit all his Goods, and the Profits of his Lands, Benefices and Promotions; and for the third Offence shall forfeit as before, and be committed during Life.

But these Severities were not effectual to prevent this Vice; therefore in the same Year (e) another Act was made, by which all Marriages were declared to be lawful, which were not prohibited by God's Law.

* In vita Patris. fo. 32. (b) 1 H. 7. cap. 4. (c) 31 H. 8. cap. 14. (d) 32 H. 8. cap. 10. (e) 32 H. 8. cap. 38.

This was a general Law, in which the Clergy as well as Laity were comprehended ; but the Statute which more immediately concerns them was made *Anno 2 & 3 Ed. 6.* (f) The Preamble sets forth, that it would be better for Priests to live chaste and separate from the Company of Women, that they might with more Fervency attend the Ministry of the Gospel, and that it was to be hoped they would of themselves vow perpetual Chastity, but that when it was enforced by severe Laws, such Inconveniencies did follow which were not fit to be mentioned ; therefore it was Enacted, *That all Laws, Canons and Constitutions, prohibiting the Clergy to marry (who by the Laws of God might marry) and all Pains and Forfeitures therein contained, should be void.*

Then the reformed Ministers began to preach very earnestly against all Vows of Continency, and both in their Sermons and other Discourses endeavoured to convince the People of the Excellency and Blessings of a married State.

And certainly it was very necessary to reform the Lives of the Priests at that Time, in order for the better Reformation of Religion it self, it being then a common, tho' a very pernicious Opinion, that it was better for a Priest to keep a Whore than a Wife ; and the Reason which they gave was, because a Clerk, who married after he had vowed to be Continent, engaged himself by an Oath to violate a Law (during his Life) which ought to be inviolable ; and this involved him into a greater Guilt than falling sometimes into the Sin of Fornication, of which he might repent and return to the Observation of his Vow, but by marrying he was under a Necessity to violate that Vow without Repentance.

Besides, it was to be feared, that if the Monks, who at that Time might renounce their Religion, should likewise abstain from Marriage, it might be a Means to bring those scandalous Impurities into the reformed Church, which had for so many Ages dishonoured Christianity, and exposed the Priests to the Scorn and Contempt of wise and honest Men.

'Tis true, the Primitive Fathers did recommend the Celibacy of the Clergy, believing that the sensual Cares of a married Life might make too great a Diversion from those holy Exercises which they daily performed ; they preached by their Example, but it was as if they had not sufficiently studied Humane Nature, for if they had they would not have imposed on their Successors any Thing so contrary to it, as to establish Celibacy of the Clergy into a Law ; but could they have foreseen the dismal Consequences of such a Law, and how frequently the Priests were defiled with Uncleanness, they would certainly have preached as much against it at that Time, as some of the Clergy did at the Beginning of the Reformation ; tho' they

(f) 2 & 3 Ed. 6. cap. 21.

were reproached with the Scandal of waging War against *Rome*, for the same Reason as the *Gracians* did against *Troy*, viz. For the Sake of a Wife; and the married Clergy were loaded with all Manner of Calumnies, by those from whose Errors they reformed.

Florimond de Remond calls Marriage the Gordian-Knot, which ties those to Heresies who were spewed out of Convents for Pride and Lust; he accuses *Peter Martyr* for falling in Love in his old Age, with *Catharine Meranda*, a Nun, whom he afterwards married; and reflects on *Ochinus* for travelling over the *Alpes* with an handsome *Italian* Girl, and debauching her under a Promise of Marriage, which he did perform, but being weary of her, he caused her to be dispatched out of the World; and *Sanders* maliciously writes of our married Clergy, whom he calls the new Preachers, and tells us they were so unhappy in their Wives that they married none but lewd Women, and therefore Queen *Eliz.* put forth a Proclamation that they should marry those Women who were of good Reputation.

But he tells us likewise that this Proclamation had no Effect, because a virtuous Woman would not marry a Priest; that it was a Scandal to be the Wife of a Clergyman, and that such Marriages were no better than Adulteries; and for these Reasons the Queen would not suffer a Clergyman's Wife to appear at Court; that Persons of Quality would not converse with them, and that their Husbands kept them as Instruments of their Necessities and Uncleaness; all which are Calumnies invented by that Historian, and not so much as mentioned by any Writer at that Time.

For they knew it to be very Difficult for Priests to live chaste without Marriage, and that the Reformation of the Church could not well be accomplished without abolishing Celibacy, by which the Clergy were restored to that Right which is common to Humane Nature, and which is of such a particular Advantage to the Protestant Clergy in other Nations, that 'tis believed many of them would be reconciled to the Church of *Rome*, if by the *Laws* of that Church, Priests were not prohibited to marry; and there are some who prefer Polygamy to Celibacy, and particularly || *Lyserus*, who was so zealous an Advocate for it, that he tells us the Christian *Law* of marrying but one Wife, and no more, did retard the Conversion of the Infidels.

But to return to the Statute before-mentioned, it was taken to be only as a Toleration for Priests to marry, as *Usury* and other unlawful Things were allowed by the State, in order to prevent greater Inconveniencies; and that, notwithstanding that Act, it was still unlawful for the Clergy to marry, and

* *Ogier de itinere Sue.* fo. 209, 210. || Polygamia Triumphantrix. fo. 92.

therefore

therefore the Issue of such Marriages were accounted Bastards; so that by another Act, *Anno 5 & 6 Ed. 6. cap. 12.* it was declared that the Marriage of Priests should be held lawful, and their Children legitimate and inheritable to their Estates, and that they should be *Tenants by the Curtesy*, and their Wives endowed.

But *Anno 1 Maria* those Statutes were repealed, and so continued all Queen *Elizabeth's* Reign; but in the first Year of King *James* they were revived, and so they continue to this Day, so that all Statutes, Canons and Decrees which prohibit the Marriage of Priests are now void; but some are of Opinion, that the Laws which inflict Punishments for their Incontinency are still in force.

So that now 'tis as lawful for any of the distinct Orders and Degrees of Churchmen to marry, and to make their Addresses for that Purpose, as for any of the Laity; and here I cannot but take Notice of that Advice which a Lady of Quality gave to a Prelate who courted her to Marriage, but he being to go a Journey before the Ceremony could be performed, she told him that his Journey ought to be very short, because a Mistress was a Benefice which obliged to Residence.

And thus much for Marriage, as it relates to the Clergy; I shall now mention something concerning it, as 'tis a Civil Contract between the Parties, which all Christian Nations have agreed should be published in a solemn Manner, and both the *Jews* and the *Heathens* themselves had some particular Solemnities upon this Occasion, which may not be improper here to mention, because in some Circumstances they agree with the Form used amongst us.

Amongst the *Jews* the Man and Woman were led to the House of Marriage by their special Friends, who were called the Children of the Bride-Chamber, and there were to be present Ten Men at least, and the Bill of Dowry being ratified by a Publick Notary, the Man spoke thus to the Woman, *viz. Be thou a Wife to me according to the Law of Moses, and I will worship and honour thee according to the Word of God; I shall feed and govern thee according to the Custom of those who worship, honour and govern their Wives faithfully, I give thee for Dowry of thy Virginity 50 Sheckles, which in our Money is 3 l. 2 s. 6 d.*

This seems to be comprehended in our Form, *With my Body I thee worship, and with all my worldly Goods I thee endow.*

Amongst the *Romans* there were Three Sorts of Marriages, *viz. Confarratione, Coemptione, Usus.*

The first of these was performed with great Solemnities by the High-Priest himself offering Sacrifices to their Gods, and particularly of a Barley Cake, Part whereof was afterwards eaten by the married Couple; and 'tis probable that we derived from them the Custom of making a Bride-Cake at our Weddings.

Coemptio

Coemption was the solemn binding themselves to each other by giving and taking a Piece of Money: We have something like this at our Marriages, *viz.* The Man usually giving the Woman some Money at that Time, which is called the Endowment-Money; this is not essential to a Marriage, for 'tis often omitted, because the Man must say, *With all my Goods I thee endow*: In the first Ages of Christianity this was done in Writing; and such Writings were called *Tabula Dotales*, which may be another Reason why the Word *Endow* is still continued in our Marriages.

The Romans likewise used the Ceremony of a Ring; and this appears by the *Satyrists* in these Words,

Digitis pignus fortasse dedisti. (b)

We might likewise derive this Custom from them; and we put it on the Fourth Finger, because there is a Nerve which from thence is joined to the Heart; 'tis a Ceremony of great Antiquity, and 'tis a Token that the married Couple should continue in that State without End, that is, as long as they both live.

And as these Ceremonies are required at the Time of Marriage, so some are necessary before it, as, *Asking the Parties in the Church*, which is expressly provided by the Statute 2 & 3 Ed. 6. *viz.* That no Man shall have Liberty to marry without such asking, which we call the Publication of the *Banns*, &c. and this is the very Signification of the Word it self; 'tis true, the old Glossographers tell us, that it signifies a Proclamation, but as applied to Marriage it rather imports a Publication; and this must be done Three Times, either on Sundays or Holidays, in the Church where the Parties live, that any Person may have convenient Notice to object against the intended Marriage.

And if the Objection is material, then the Minister ought not to proceed (i), if he doth, the Party may complain to the Ordinary, who will send an Inhibition to him.

There are several Objections which are material, *viz.* *Pre-contract* before good Witnesses, *Consanguinity* or *Affinity*, Parents not consenting, or Guardians, if the Parties are under Age, for in such Case they are not *sui juris*; and therefore, by another Canon (k) it was enjoined, that Infants should not marry without their Parents Consent; and if a Minister should marry them without such Consent, testified by themselves in Person, or by sufficient Witnesses, that he should be *ipso facto* suspended for Three Years, tho' the *Banns* were published. (l)

The Paternal Authority was very much strengthened by an Edict in France, not by inflicting any Punishment on the Priest,

(b) Juven. Satyr 6. (i) Can. 102. (j) Can. 100. (l) Can.

but by making it lawful for Parents to disinherit their Children under 25 Years, who married against their Consent; 'tis true, this Law might not be convenient for all Children under that Age, because there may be some Fathers, either so covetous or humourous, that they will never give Consent; but still 'tis a Law, which may prevent a Multitude of Evils; for there are infinitely more Children, who in the Heat and Folly of their Youth will run themselves into unsuitable Matches, than there are Parents who will oppose reasonable and convenient Marriages.

But the Laws of all Nations are against Clandestine Marriages, and therefore with us it must be done in *facie Ecclesiæ* (m), but this is disused; it ought likewise to be in one of the Churches where one of the Parties live, and in Time of Divine Service; and this is required by the Canon, tho' the Person hath a License.

But by the ancient Canons it was to be celebrated in the Church of that Parish where the Woman was an Inhabitant, and therefore at this Time there is a Fee due to the Minister of that Church, tho' the Parties are married elsewhere; but this is only by the Ecclesiastical, and not by the Common Law (n), without a Custom to support it.

This asking is likewise required by the Rubrick in the Common-Prayer, which is confirmed by Act of Parliament.

Attendants. But by the Ecclesiastical Canons (o) now in Force 'tis ordained, that such who have Episcopal Jurisdiction, or the Commissary of the Faculties, Vicars-General of Prelates, Guardians of the Spiritualities *sede vacante*, or Ordinaries, exercising Episcopal Jurisdiction, may grant *Licenses* to marry without Bans.

However, 'tis expressly required by the Canon, that such Licenses be granted only to those who are of good Estate and Quality; and Security must be taken, that there is not any Impediment or Precontract, Consanguinity, Affinity, or any other just Cause to hinder the Marriage; nor that there is any Suit depending in any Ecclesiastical Court concerning any Contract or Marriage on either Side; and that the Parties have the Consent of Parents, &c. and likewise, that the Marriage shall be celebrated in the Parish-Church where one of the Parties dwelleth, and in no other Place, and that between the Hours of Eight and Twelve in the Morning.

And it must appear to the Judge (p) (who grants the License) upon the Oath of Two credible Witnesses, that the Consent of Parents was obtained (q); and one of those Persons must likewise Swear, that he believeth there is no Impediment of Precontract, Kindred, &c. nor any Suit to hinder the Marriage;

(m) Can. 104. (n) 2 Lut 1062. (o) Can. 62. (p) Can. 103. (q) Can. 103.

and this must be done before the License is granted; and Persons offending in the Premises shall be suspended from the Execution of their Office for Six Months; and all Licenses to the contrary shall be void; and the Parties Marrying shall be subject to such Punishments which shall be appointed for Clandestine Marriages.

'Tis true, these Canons were made in Convocation, and confirmed by Letters-Patents, and are become Part of the Law of the Land for the Government of the Church; but yet they cannot alter or supersede the Statute-Law, which is expressly against marrying without publishing the Bans, that is, without asking in the Church.

But the Power of dispensing in such Cases is likewise established by a Statute-Law; and such a Power was granted to the Bishops 25 *H. 6. cap. 21. viz.* that they might dispense, as they had usually done by Virtue of the Common Law, or the Customs of the Realm; and such Licenses have been granted here ever since the Reign of *Ed. 3.*

We rarely meet with any Prosecutions against Ministers marrying, or against Persons being married without License or Bans (*r*), some there are; as for Instance, an Incumbent both of a Donative and a Presentative Church married Two Persons in the *Donative*, without License or Bans; and upon a Prosecution against him in the Spiritual Court, a Prohibition was denied, because he ought to have married then in the Presentative Church.

So *Anno 5 Will. (f)* there was a Marriage in a Conventicle, without License or Bans; the Man was prosecuted in the Spiritual Court for Incontinency and Fornication; he suggested the Statute 1 *Will. cap. 5.* which exempts Persons from Prosecutions in that Court for Non-conformity to the Church of *England*, so as they take the Oaths of Allegiance and Supremacy, and subscribe the Declaration, &c. that he had qualified himself according to the Statute, and that he was married before Witnesses in the Face of their Congregation, and therefore ought not to be prosecuted for not conforming to the Church of *England* in their Marriages; there was a Prohibition granted, and a Rule made, that the Party should declare upon it, so that upon a Demurrer the Law might be determined, but it was never argued.

But there being some Churches and Chapels exempted from the Visitation of the Ordinary, the Ministers of such Churches did usually marry without either License or Bans; and these were call'd (not improperly) lawless Churches, for by this Means those good Laws which had been made to prevent Clandestine Marriages were become ineffectual.

Therefore *Anno 7 & 8 Will. cap. 35.* a Statute was made, prohibiting all Parsons to marry People, or suffer them to be

married in their Churches or Chapels, exempt or not exempt, or in any other Place whatsoever, without Publication of the Banns, &c. or without License; the Penalty is 100 l. for each Offence, to be recovered by Action of Debt, Bill, Plaint or Information, one Moiety to the Queen, the other to the Informer; and the Man thus married forfeits 10 l. to any Person who will inform; and this is to be recover'd in the same Manner with Costs of Suits; and every Sexton knowingly assisting at such Marriage forfeits 5 l. to be recovered with Costs as aforesaid.

So that now these *lawless Churches*, so called, because they were not subject to the *Canons*, and which were exempted from Episcopal Visitation by the Pope's Bulls, in favour of some Monastery of regular Monks or Friars, and which continued till that Statute was made *, are now made subject to that Law, which did not altogether prevent *Clandestine Marriages*; for the Lower-House of Convocation several Years afterwards complained to the Bishops of the Scandal occasioned by such Marriages.

But ever since Licenses were granted, the Cognizance of the Sufficiency of them, both in Point of Form and all other Circumstances, belonged to the Ecclesiastical Court, and the Party had no Remedy but by Appeal, if they judged wrong; but if the Question was, whether the Bishop had Power to grant a License? and they adjudged against such a Power, a (a) Prohibition did lie.

Certificate of the Bishop.

And as they had Cognizance of Licenses, so they had a Jurisdiction as to the lawfulness of Marriage. For after the Empire became Christian, Princes had so much Honour for the Bishops, by whose Means they were converted, that they gave them Jurisdiction in particular Causes, of which Marriage was one, because it was always celebrated in *facie Ecclesie*, and therefore at this Day, if Issue is joined upon the lawfulness of a Marriage, it must be tried by the Bishop in his Consistory Court; and for that Purpose the Courts of Law write to him to certify the Legality of the Marriage, and then give Judgment according to that Certificate.

But if the Marriage is only in Issue, and not whether the Parties were lawfully married or not, this must be tried at (b) Common Law.

And therefore, where a Bond was given to pay so much Money upon + Marriage; and in an Action brought, the Defendant pleaded that the Plaintiff was not lawfully married, and had a Verdict, it was moved in Arrest of Judgment, that the lawfulness of the Marriage ought to be tried by the Ordinary, but it was not allowed, for married or not, was the material

* March. 1700. (a) Jones 257. (b) 2 Cro. 102. Shore 50.
+ 1 Lev. 41.

Part of the Issue; and tho' the Defendant had put the Word *Lawfully* in his Plea, of which the Plaintiff might take Advantage by Demurrer, yet having joined Issue upon the *lawfulness* of the Marriage in a Personal Action, where it doth not naturally come in Question, as in *Dower*, the Verdict shall not be set aside.

In *Dower*, the Issue was, that the (c) Woman was not *lawfully married*; and the Bishop certified, that the Man was *circiter Etatem 12 Annorum*, and that the Woman was Sixteen, and that they contracted Marriage, which they procured to be lawfully solemnized in the Church.

This was held an insufficient Certificate, because the Bishop did not certify the *lawfulness* of the Marriage; he was fined 20 l. and another Writ was directed to him to make a better Return, and thereupon he certified the Age of the Man to be 11 Years, 10 Months, and 20 Days, and that the Marriage was lawfully solemnized between them in the Church, *Et sic in legitimo Matrimonio Copulati fuerunt*; and this Return was held insufficient by several Civilians, both in Point of Form, and in Law, because the Words, *Et sic in legitimo Matrimonio Copulati* were only an Inference collected from the Premises, and not his direct Answer to the Writ, as it ought to be; and as to the Law, it was held, that the Bishop ought not to certify that the Marriage was lawful, because the Man was under 12 Years of Age, for before that Time he cannot by Law consent to marry.

But Seven Years afterwards the Bishop certified the Matter again, almost in the same Form, only he returned the Inquisition, and that it *plainly appeared by the Proofs* that they were *legitimo Matrimonio Copulati*; and as to the Point of the Law, most of the same Civilians changed their Opinions, that the Marriage was lawful; but this must be *quoad Dotem*, for by the Law 'tis only a Marriage *de facto*, and in such Case the Wife shall be endowed.

Two of the Judges excepted against the Form, *viz.* That the Bishop ought to have certified his own Opinion of the Marriage, and not what appeared to him upon the Inquisition to be lawful.

But where in *Dower* upon the like Issue, the (d) Bishop certified that the Parties were in *in vero Matrimonio Copulati sed clandestino*; this was held a good Return, for if it was a true Marriage it was lawful.

'Tis certain, that Marriage hath been encouraged in all civilized Governments, but not at all Times; for with us, there are some particular Seasons in the Year wherein it ought not to be celebrated, as in *Lent*, and on *Fasting-Days*, because the Mirth and Rejoycing which usually accom-

Time in which
Marriage is pro-
hibited.

(c) Dyer 305. (d) 2 Ro l. Abr. 591.

pany Marriages are not suitable to the Humiliation and Sorrow which we ought to have at that Time for our Sins, therefore our Ancestors thought it convenient to restrain the common Liberties of Marriage during those Seasons.

But I know not upon what Authority the *Almanack-makers* tells us, that Marriages are out from *Advent-Sunday*, till the Day after *Epiphany-Sunday*; and from *Septuagesima*, or the Third Sunday before *Lent*, to *Low-Sunday*, which is the first Sunday after *Easter*; from *Rogation* which is a Fortnight before *Whitsun-tide* to *Trinity-Sunday*.

For the Time of *Advent* was never observed in our Church as a Fast; and both the *Easter* and *Whitsun* Weeks are usually Times of Mirth and Rejoycing.

'Tis true, the *Bans* are seldom or never published in *Lent*, yet People marry at that Time with Licenses; and probably we are told, that Marriages go out at the Times abovementioned, that those who intend to come in may purchase Dispensations for that purpose,

Modus Decimandi.

THIS is where Lands, or a Yearly Pension, or some Money, or other Thing is given to the Parson in lieu of his Tythes, in kind arising in such a Place; and 'tis a certain Rule that a *Modus* is not good, but where something is paid or done by a Layman for the Benefit of the Parson.

But it hath been a Question whether 'tis good to pay part of the Tythes for all of the *same kind*, as to pay an Apple for the Tythes of all his Apples; 'tis certainly wrong to pay the *Tenth Sheaf* in Satisfaction of Tythes of all Corn which shall grow on such a Number of Acres (*e*), because this puts it into the Power of the Possessor to pay what he thinks fit, that is, to make as much into Sheaves as he pleaseth.

A *Modus Decimandi* doth arise either by *Composition*, *Custom* or *Prescription*.

Compositions were usually entred into the Bishop's Register, especially if made on a good and valuable Consideration, and being constantly paid it became a Custom; and tho' there is no manner of Proportion between the Valuation of Things at the Time when such Compositions were first made and now, and by consequence no reason to continue them, yet the Prevalency of a Custom is so great, that it hath got the better of Reason, and is allowed for Law at this Day.

These *Compositions* are supposed to be the chief Foundation of every *Modus*, but the true Cause of them hath been the Negligence of the Clergy themselves to suffer an Agreement of their Predecessors to grow into a Custom.

(e) 1 Add. 199.

But since the Statute 13 *Eliz. cap. 10.* no such Composition can be made, because all Grants of Spiritual Persons, which are binding, are restrained to 21 Years, or Three Lives.

Before the Statute, a Composition to be discharged of all Tythes had been good, without any manner of Recompence to the Parson; yet my Lord *Hobart* (f) tells us, that when it run out into a Prescription it died, that is, where a Layman prescribed in *non Decimando*, which he cannot do; and therefore by the Policy of the Law, such Prescriptions, tho' they strengthen all Mens Titles, yet in this Case they fail, because 'tis in favour of the Church; for tho' the Law allows that a Layman may be discharged by a Grant where it appears, yet it will not allow it in Prescriptions, where the original Cause of such Discharge doth not appear.

And therefore 'tis a received Maxim, that a Layman cannot prescribe in *non Decimando*; but this was introduced into the Law when Spiritual Men were Judges in those Courts, and even at this Time will admit of many Distinctions.

2. Custom is of larger extent than Prescription, for it must be alledged in a Province, County, City or Hundred; and the manner of Pleading it is, *viz.* That in such a County there is, and, Time out of Memory, hath been such a Custom used and approved therein, that is to say, &c. and so set forth the Custom.

But a Custom for those who have Lands in one Village, and who live in another to pay only 4 *d.* per Acre in Satisfaction of all Tythes of those Lands, is very unreasonable, because 'tis allowing Foreigners a greater Privilege than the Parishioners, who are at greater charge to the Repairs and Ornaments of the Church, by reason of their Residency.

3. Prescription is called by Sir *Simon Degg*, the younger Daughter of Custom, and is always confined to a certain Person, House or Land; and in pleading it must be alledged, that such a Person, and all those whose Estate he hath in such Land have, Time out of Mind, paid so much yearly, &c. in full Satisfaction of all Tythes arising on those Lands.

So that we see something must be paid to the Parson, for 'tis an unreasonable and void Prescription where nothing is allowed to him; as for Instance, if a (g) Man should prescribe to be discharged of Tythes for finding Straw to Thatch the Body of the Church, this is not a good Prescription, because there is no Recompence to the Parson.

So where a Prescription is to pay the Tenth Part, *absq; visu & tactu* of the Nine Parts by the Parson (h); this is unreasonable, because a Man ought not to divide for himself without

(f) *Hob.* 297. (g) 1 *Rol. Abr.* 647. *March* 37. *Cro. Eliz.* 276. (h) *Hob.* 107. 1 *Rol. Abr.* 648.

the view of the Parson or his Servant, and then to make choice of his own Division.

'Tis likewise unreasonable for a Man to prescribe to be discharged of Tythes of dry Cattle, in Consideration of paying Tythes to the Parson (*i*) which are due to him for other Things; as to pay so much Money for every Cow and Calf, and so much for every Milch Cow, in Satisfaction of all Tythes for Cows (*k*), and for the *Herbage and Pasture* of the Land in such a Parish is not good, because Tythes for Cows can be no manner of Satisfaction or Recompence for the Tythes of *Herbage*, &c.

'Tis likewise to be observed, that the Person who Pleads a Prescription must bring his Case within the Compass of it (*l*); as if a Man prescribes to pay nothing for Barren Cattle, reared for the *Plough*, he must alledge that the Cattle were reared for that purpose.

The Payment must also consist in something that is durable and certain, because the Tythe it self is a certain Inheritance, (*m*); and therefore 'tis unreasonable it should be extinguished by any Recompence of less Value which is not durable.

But the Civil and Ecclesiastical Laws differ from the Common Law in Cases of Custom and Prescription, for they allow an usage for 40 Years to be good Evidence to support a Custom; but by the Common Law it must be beyond the Memory of Man, and it must be constant, and without any Interruption. Yet a Disturbance for 10 or 20 Years shall not destroy such a Custom, for 'tis only a Suspension of the Right for a Time.

By a long and peaceable Possession all manner of Property is transferred without any other Title or Delivery, because 'tis for the Interest of Mankind, that all Demands of Right should be limited to a certain Time, therefore a Custom beyond Time of Memory obtains the force of a Law, for no Proof can be brought when it was otherwise.

I have been the longer in describing Customs and Prescriptions, that I might shew there may be a lawful Exemption to pay less than the true Value of the Tythe, that is, to shew the Parson hath a Feather who ought to have the Goose.

I grant that those, who are of Opinion that Tythes are due by Divine Right oppose all manner of Customs to lessen the Tenth Part, for they say no Custom can be good against the positive Law of God.

But the Common Law distinguishes in this Case, by allowing Tythes to be due *Jure Divino secundum quid*, that is, in respect to the Maintenance of the Clergy, but not *quoad decimam parsem*, and therefore it allows a *Modus* where there is enough besides to support the Parson.

(*i*) Cro. Eli. 786. (*k*) 2 Lut. 1052. (*l*) 1 Rol. Rep. 62. (*m*) Hob. 40.

And though we sometimes find in our Books, that the Ecclesiastical Courts will not allow a *Modus*, yet the Canonists and Civilians, in Conformity to our Law, do allow Compositions for Tythes made with Laymen, so as they have the Bishop's Consent; some Compositions have been made without such Consent, and held good for what is past; but the Revenues of the Church being diminished by this means, it was thought requisite that no Composition should be made *sine judicis Autoritate*, which implies that by his leave it might.

A *Modus* thus qualified was allowed by the Ecclesiastical Law, and a Prescription to maintain it is only to supply the Defect which may happen in the Proof of the Composition, which being made Time out of Memory may be lost.

These Prescriptions are likewise allowed by the Statute Law; for it hath been enacted, That no Person shall be sued for Tythes of Lands (n); which by Prescription are not chargeable with the Payment thereof, or which are discharged by any real Composition.

I shall now mention who may not prescribe in *non Decimando*, and who may.

'Tis generally true, that a Layman cannot prescribe in *non Decimando*, and to pay nothing in lieu of Tythes, because none but an Ecclesiastical Person is capable of having Tythes in his own Right.

Who may not
Prescribe in *non*
Decimando, and
who may.

But a Layman may lay a Prescription in a Spiritual Person, and so derive a Title under him; as for instance, if such Spiritual Person Lease his Lands to a Layman, he may prescribe under the Parson, and derive a Title from him.

So if an Abbot had been seised of Land discharged of Tythes, he who is now Owner or Farmer of that Land may prescribe in *non Decimando*, by Virtue of the Statute 2 Edw. 6. (o) which Enacts, that none shall pay Tythes otherwise than they were paid 40 Years before.

But though a Spiritual Person (p) may prescribe in *non Decimando* both for himself and his Tenants, it may be a Question whether he can prescribe for his *Copyhold Tenants*, because in such Case there must be two concurrent Prescriptions, one for the *Copyhold*, and the other in *non Decimando*; but it hath been adjudged that those Prescriptions may stand together: And still it is a Question whether a Spiritual Person can prescribe in such manner for a *Freeholder*, though he may for his Tenants for Life, for Years, or at Will.

The Churchwarden of a Parish cannot prescribe in *non Decimando*, for such Lands which are given to them as a Corporation for the repairing the Church, and the Reason is, because they are not Spiritual Persons.

(n) 2 Edw. 6. cap. 13. (o) Moor. 219. (p) 1 Rol. Abr. 653.

A Spiritual Corporation may prescribe in that manner, but when 'tis dissolved the Prescription fails; as for instance, a Man prescribed that such an Abbot and his Predecessor held Lands discharged of Tythes, which Lands came to the Crown by the Dissolution of the Abbey, and so derived a Title from thence; the Grantee shall never have any Advantage by this Prescription without the help of the Statute, (q) because the discharge of Tythes shall be intended to be originally made upon the account of some Personal Privilege granted to the Abbot and his Predecessors, (r), and not upon any real Composition.

But by the help of the Statute such Lands are discharged of Tythes if they paid none before they came to the Crown, and in such Case a Layman may prescribe in *non Decimando*.

So he may be freed from the Payment of Tythes of some particular thing by the Custom of the Parish, County or Hundred where he lives; he may likewise alledge a Custom in Two Hundreds, (s) that if any common Baker dwelling there sets up a Mill to grind Corn for the support of himself, and to sell to the Inhabitants there, by reason whereof the Parson hath a greater encrease of Tythes, viz. The Tythes of the Land, and of the Manual Occupations of such Persons who live in the said Hundreds, and who are maintained with the Corn ground at such Mill, this is good to discharge him of the Tythes of that Mill, and he may prescribe to be discharged accordingly.

Copyholders of Inheritance held of a Mannor, of which a Bishop is the Lord, may likewise prescribe to be discharged of Tythes, because their Tenements are Parcel of his Demesnes, and this discharge might commence upon a real Composition for the whole Mannor.

This was made a Question, *Trinity 41 Eliz. in t Crowther and Fryer's Case*, and the Occasion of the doubt was, because of the Two concurrent Prescriptions, which must necessarily be in *Copyholds*, viz. the Tenure of the Land to which the Owner must prescribe to make his Title, and the Prescription in the Bishop, to make good the discharge of Tythes; but it was adjudged, that the Tenant of a Spiritual Person may prescribe in him to be discharged of Tythes, because such Prescription must necessarily precede the Prescription in the *Copyhold Estate* of the Tenant.

But in all these Cases of Prescription, 'tis only to be discharged of a particular sort of Tythes; for a Prescription in *non Decimando* generally would undo the Clergy, and therefore 'tis not good where there is not sufficient left for their Maintenance.

A late learned Prelate, viz. the Bishop of *Worcester*, treating of this Matter, tells us, That a Distinction hath been found out which may be of dangerous Consequence, viz. That though a Layman cannot prescribe in *non Decimando*, yet he may pre-

(q) 31 H. 8. cap. (r) 1 Rol. Abr. 654. (s) 1 Rol. Abr. 654.
† Moor. 618. Cro. Eliz. 784. Yel. 2.

scribe to have *decimam Garbam*, for that is not *decima Garbarum*, and this he may have as a Profit *Apprendre*; and he finds fault with my Lord Coke for reporting it as Law in the Bishop of Winchester's Case, (1) that a Lord of a Mannor may have Tythes as Appurtenant to his Mannor; and tells us what my Lord Hobart's Opinion was of that famous Reporter, (as he calls him) that sometimes he hath obtruded his own Judgment as the Resolution of the Court, which hath been set in a clearer Light by the contemporary Lawyers, who have reported the same Cases.

If this was true, it must shake the Authority of my Lord Coke's Reports; but what ever my Lord Hobart's Opinion was, in reference to this Matter, he who carefully reads the Bishop of Worcester's Case will find the Bishop of Worcester mistaken; for 'tis not reported there that a Lord of a Mannor may have Tythes appurtenant to it, but quite contrary, viz. That he cannot prescribe generally to have Tythes belonging to it, without some special Matter shewn; because Tythes which are Spiritual and of Divine Right, cannot be Parcel, or Appurtenant to a Temporal Inheritance; these are my Lord Coke's Words.

The like, he tells us, was resolved in *Pigott and Hernes's Case*, viz. upon (u) Special Matter therein alledged that one might have Tythes as Appurtenant to a Mannor; now the Special Matter was thus, viz. in Consideration of the Payment of a yearly Pension to the Parson, in Satisfaction of all Tythes arising yearly in the Parish, &c. the Lord of a Mannor prescribed to have *decimam Garbam* & *cumulum granorum* yearly arising there.

Justice Croke and Serjeant Moor, who Report the same Case, agree with my Lord Coke in it, viz. that this was not a Prescription in *non Decimando* by a Layman, but a *Modus* of Six Pound *per Annum*, which was the Pension, and not Six Shillings, as the Bishop of Worcester mistakes it, and this was to be in Satisfaction of all Tythes, which Prescription was held good: And my Lord Coke gives the Reason for it, because it might be intended that the Lord of the Mannor was seized of the whole, before any Tenancies were divided out of it, and tho' as a Layman he could have no Infeodation of Tythes, so as to create a perpetual Right to them, yet they might have the Inheritance thereof by a Grant or Composition; and 'tis probable it might be by one of those ways, because there was an expresse Recompence to the Parson, viz. a Pension of Six Pounds *per Annum*.

Neither can I see the dangerous consequence of the aforesaid Distinction (as 'tis called) for the Bishop of Worcester himself tells us, (x) that *Decima garba* and *Decima garbarum* is the same thing in a Composition for Tythes, and Quotes an Authority to

(1) 2 Rep. 45. (u) Cro. Eli. 599. Moor 483. (x) Stillingfleet 220.

prove it, (y) and if 'tis the same there can be no danger in the Distinction.

But tho' Churchwardens cannot prescribe in *non Decimando*, yet a Parish may in *modo Decimandi*, as to pay their Tythes in Grass-Cocks, (z) tho' generally it ought to be made into Hay; but a single Parishioner cannot, because, as to his part, 'tis a Prescription in *non Decimando*.

He may prescribe to pay the Tenth Acre of Grass standing, so in (a) Consideration that he hath made the first Moath into Hay to be discharged of Tythes of the latter Moath.

So in Consideration of making the Grass into Hay, (b) he may prescribe to be discharged of the Tythes of the Pasture of these Lands.

So in Consideration that the Parson and his * Predecessors have been seised in Fee of a Meadow in such a Vill, and had taken the Profits thereof in full Satisfaction and discharge of Tythe-Hay arising in the said Vill.

How it may be discharged. If the Nature of the thing is altered for which a *Modus* was paid, this Destroys the *Modus* it self; as if there is a Prescription to pay so much for Hay and Grass (c) yearly arising in 40 Acres of Land, and this is afterwards converted into a Hop-garden, or Ploughed, the *Modus* is gone, (d) but yet when 'tis turned into a Meadow again, the *Modus* shall revive.

So a *Modus* to pay 6 s. 8 d. for all manner of Tythe (e) of a Park, which is afterwards disparked and converted into Tillage, the *Modus* is destroyed, but if 'tis to pay 2 s. for so many Acres (f) in the Park, and also the Shoulder of every Third Deer killed there, though 'tis afterwards disparked, the *Modus* shall continue, because the Prescription relates to the Soil, and not to the Park.

'Tis true, this was my Lord *Hobart's* Opinion, and the Court was divided upon it; but in the Case of *Bedingsfield* and *Frake*, which is reported by Serjeant *Moor*, 'tis said, that Tythes shall be paid in kind, and not the 2 s. only, because the Prescription, as to the Venison, is gone, and by consequence the whole *Modus* falls with it.

But my Lord *Hobart* did not alter his Opinion, for he held that the Payment of 2 s. was certain, and could not be discharged by the disparking; that the Venison was only casual, for if no Deer was killed the Parson could have no Venison, and that it could not fall into a *non Decimando*, because of the Payment of 2 s. per Annum.

If there is a *Modus* (a) to pay a Sum of Money for Tythe of a certain Piece of Ground which is afterwards built on, and

(y) *Moor* 378. (z) 1 *Rol. Abr.* 247. (a) *Hob.* 328. 1 *Rol. Abr.* 648. (b) 1 *Rol. Abr.* 649. * *Idem.* (c) 1 *Rol. Abr.* 551. (d) *Godb.* 194. (e) 1 *Rol. Abr.* 651. (f) 1 *Rol. Rep.* 129. *Hob.* 39 *Meor.* 863. (a) *Hob.* 11. con-

converted into Gardens, the *Modus* continues, because it may reasonably be intended that such a Form of tything was used for the Land it self before the Houses were built.

If Lands are given to a Parson (b) in Satisfaction of Tythes and he is evicted, the Tythes in kind shall revive; but if 'tis lett to Farm, and the Lessee Pays the Tythes in kind, that shall not destroy the Prescription.

A *Modus* is in Nature of Tythes, and therefore the Clergy may Sue for it in the Spiritual Court, and the Courts at Law will not prohibit such Suits, because the Ecclesiastical Court had the original Cognizance of the Matter.

In what Courte to be recovered.

But if the Defendant should suggest that the Parson had mistaken the *Modus* and he should shew another, in such Case a Prohibition shall go, because otherwise the Spiritual Court would try a Custom, and that might be prejudicial to a Man's Inheritance, for their Law differs from the Common Law both in the Nature of a Prescription and the Proof; as for Instance, an Usage for Term of Years is a good Custom in their Law, and it allows no Proof but by Two Witnesses, but at Common Law there can be no Prescription within Time of Memory, and the Proof of a Fact by one Witness is held sufficient.

Now if the Plaintiff should declare upon such a Prohibition (c), and the Defendant Pleads, and Issue is taken upon it, and the Jury should find a *Modus* different from what is pleaded; no Consultation shall go, because it appears by the Verdict, that he ought not to sue for the Tythes in kind.

But if the Defendant pleads Payment, that shall be tried in the Spiritual Court (d), and no Prohibition shall go.

So if a Vicar libels for Tythes, and the Defendant Pleads that he paid a *Modus* (e) to the Parson, a Prohibition shall go, for a Controversy between Spiritual Persons shall never turn a Parishioner *ad aliud examen*.

'Tis true, there is a Case in *Bulstrode* where it was adjudged otherwise, and the reason was, because the *Modus* can never come in Question upon such a Plea but the Right of Tythes, viz. to whom they should be paid, whether to the Parson, or to the Vicar, and that shall be tried in the Spiritual Court.

Lastly, What shall be a good *Modus* and what not, you may see under the respective tytheable Things in Title *Tythes*.

Monks and Monasteries.

THE original Institution of a Monastick Life was to relinquish the Things of this World, and wholly to live up to the Rules and Precepts of our Saviour; but it was never in-

(b) 1 Rol. Rep. 176. (c) Hob. 192, 300, 301. (d) 2 Rol. Abr. 304. (e) Sid. 332. 2 Bulst. 157.

tended to distinguish Men by particular Orders, or by living under certain Rules; for *Paulus Thebeus*, who fled into the Wilderness from the Persecutions of *Decius* and *Valerian*, and from thence was commonly called *Paul the Hermit*, was the first who lived after this manner, where he and his Followers continued for the Space of 50 Years and upwards, till Peace was restored to the Church by *Constantine* the Great, and a little before that Time, *St. Anthony* likewise became an *Hermit* in the Wilderness in *Egypt*.

This solitary way of living spread it self into *Syria*, *Pontus*, and *Asia Minor*, and the *Hermits* or *Monks* of *Egypt* acknowledged *St. Anthony* to be their Founder; and all others took the Name of *St. Basil*, for there were no other about the beginning of the Fourth Century.

Not long afterwards *St. Athanasius* came to *Rome*, where he published the Life of *St. Anthony*, and many of that Place chose that way of living, which was soon propagated into other Provinces.

They were not yet got into Towns, neither were they Ecclesiasticks, but *Laymen*, who spent their Time in Prayers and Labour; 'tis true, they were not excluded from Ecclesiastical Employments, for it was a Course of Life which became *Novitiate*, when the Bishop should adjudge them worthy of any.

And now having with great Vigour opposed several Heresies in the Eastern Church, they were called from their Solitude, and received into the Suburbs; and *St. Chrysostome*, who was a Monk himself, and afterwards Bishop of *Constantinople*, was the first who brought them into Cities, about the latter End of the Fourth Century, where they apply'd themselves to Study, and got into Holy Orders, and into great Reputation, for confuting the Heresy of *Nestorius*.

This made them grow vain and conceited, and though they were subject to the Bishop, yet they interposed in all manner of Business, without his Knowledge or Consent; so that in a very few Years they became insupportable to him, and for this Reason there were several Canons made in the Council of *Calcedon* to subject them to the Primitive Jurisdiction of their proper Bishop, and to prohibit them from meddling in any Affairs without his Permission.

But by the Indulgence of the Bishops in that Age, these Canons were made useless; for though the Monks were bound to come to their Parish Churches, yet sometimes they had leave from the Bishop to have a secular Priest administer the Sacraments to them in their own Monasteries, then they were permitted to have a Priest of their own Body, upon Condition that he continued to be a Monk, and officiated only in the Monastery; and then several Rules and Orders were made amongst themselves, for the more regular Performance of those Ecclesiastical Functions, which being done without the Knowledge or Di-

Direction of the Bishops, gave occasion to these Disputes, which afterwards happened between them and the Monks, who now refused to obey the Orders of their Superiors, pretending them to be contrary to the Rules of their Monasteries.

And thus it stood in the Eastern Church for the Space of 200 Years and upwards; there were also some Monks in the West, before St. *Benedict*, but not addicted to any particular Order, for a Monk, as such, was received in all Monasteries, but there were so few, that about the beginning of the Sixth Century, St. *Benedict*, who then established his Order, is commonly called the Father of Monks.

But he did not intend to make any Innovation in the Monastick Life; his Business was to Collect what was most perfect amongst others, and bring it to be observed by those of his Order, who at the first Institution were all Laicks.

Eusebius of *Varcelles* (f) was the first who brought them into Holy Orders, and St. *Martin*, who came from *Millan*, was the first who brought the Form of a Monastick Life into *France*, and he built a Monastery for that purpose about Two Miles from *Tours*, of which Place he was Bishop.

Sulpitius Severus, who wrote his Life, informs us, that his Monks encreased so fast, that there were almost 2000 of them at his Funeral, and 'tis probable that out of such a great Number some of them might come hither, for here were no Monks before the *Saxons*, but St. *Martin's* Monks; and those few Monasteries which were here in the Time of the *Britains* were dedicated to him, and so they were in *Ireland*, for St. *Martin* was Uncle to St. *Patrick*, and gave him the Habit of a Monk.

In the City of *Canterbury*, there was an ancient Church dedicated to this St. *Martin*, it was built by the *Romans*, and rebuilt by St. *Augustine*, and by him dedicated to *Christ*, which is the Cathedral at this time, he likewise built a Monastery there, which is now a Church, and called by his Name, and he being of the Order of St. *Benedict*, (i) was the first who brought these Monks there, and placed them in his own Foundations in the Year 615.

'Tis true, there have been some Men who denied the *Benedictine* Order to be so long in *England*; and some learned Persons Beyond-Sea have affirmed, that all the ancient *English* Monks were of the Order of St. *Equitus*, or of some other Order, which occasioned the *Benedictines* to write to our Antiquaries, Mr. *Camden*, Mr. *Selden*, Sir *Robert Cotton*, and to Sir *Henry Spelman*, to know the Truth of this Matter, and they all certified under their Hands, that there was no such Order as that of St. *Equitus*, and that amongst the *English Saxons* there

(f) *Sofom. Hist. Eccles.* 3. 14. (g) *Still. Orig. Brit.* 185. (h) *Baron Annal.* 340. N. 7. (i) *Tyrr.* 167.

were only Two Orders of Monks, of which one followed the Rights of the *Egyptian* Monks, and the other were *Benedictines*, who came hither with *St. Austin*.

These Men by a voluntary Retirement from the World, and spending their Time in religious Exercises, such as Prayer and Fasting, &c. had encreased their Houses to a considerable Number, in so much that *Trithemius* tells us there were more than 15000 Monasteries of that Order in less Time than 1000 Years after its first Institution; and *Volateran* accounted in his Time 24 Popes of this Order, 200 Cardinals, 1600 Archbishops, 4000 Bishops, 15700 Famous Abbots, 156000 Canonized Saints.

And 'tis observable that there was no other Order of Monks for near 400 Years, till the *Cluniacks* separated from them; and afterwards there were so many Orders instituted, and with such different Rules and Forms of Living, that they seem to be so many little States in the Church, and separated from her by several Interests.

With us here the most remarkable Monastery was that at *Bangor*, of which *Pelagius* was Abbot; there were above 2000 Monks in that Monastery; and when any of them in this or other religious Houses was found capable of Holy Orders by his Superiors, then he was Ordained, not by the Abbot, but by the Bishop.

In this Monastery, Men were educated both in Religion and Learning, more like the Education now in our Colleges, than in the ancient *Egyptian* Monasteries, where they laboured as well as prayed, and so did the *Benedictines* at the first Institution of their Order; for *St. Bernard* himself despised Learning, and took no Care about it, but that his Monks might be distinguished by Prayer, Fasting and hard Labour.

And so early as the Days of *Ethelfrid*, King of *Northumberland*, (k) he saw 2000 Monks praying in the Field for the Success of the *Britains* against him, who thereupon told his Army that those Men fought by Prayers, but they with the Sword; and therefore bid them fall on, which they did, and killed all those Monks in a Field near *Chester*.

I only mention this to shew that the Monks in those Times were not Men of Learning, but wholly devoted to Prayers; 'tis true, by the Constitutions of *Charles* the Great, which were made above 200 Years before that Time; Schools were appointed for instructing young Men both in Monasteries and Cathedrals, which gave the first Encouragement to Learning; and probably there might be some of those Monks who applied themselves to Studies, tho' very few; however, by this Way of Living, both Religion and Learning were thought to be advanced; and the Monks of that Age were not only Divines, but Historians; and being brought into Holy Orders, and living

(k) Selden on Polyolb. 186.

under certain Rules, they were so far encouraged in that Course of Life, that by several Exemptions they were almost freed from the Jurisdiction of the Ordinary; for they were not subject to him out of Duty but Choice, as having liberty to choose what Bishop they would to Ordain them; but when once they made their Election, they were to continue subject to him during his Life.

In a little Time they came to be distinct, not only from the Laity, but from the Secular Clergy; for, 'tis true, they never meddled with the Cure of Souls, but they busied themselves in Parochial Offices, such as Preaching, Baptizing, visiting the Sick, &c. But this was by way of Intrusion upon the Rights of the Secular Clergy, and therefore, by the Canons of the Church, they were prohibited in those Matters.

And though they were not an Ecclesiastical Body of Men, yet they received Tythes, which were originally given for the Maintenance of the Parochial Clergy, and the Service of the Church; and it was a Reproach to that Age, that the Payment thereof was so much neglected during the Time the *Normans* ruled here, for then the poor Secular Clergy had only a Third Part of the Tythes; the Monks had the rest; and not only so, but several of the Nobility having built Monasteries appropriated all the Tythes to them, which the Monks got the Pope to Confirm.

It was requisite upon such Confirmations for the Bishop to take care that a competent Maintenance should be settled upon the Parochial Clergy; but the Monks were so much favoured by the Bishops in those Days, that the Clergy had but a very poor *Subsistence*: And this occasioned honest Pope *Alexander III.* to reprove the Bishops, and to decree that the Parochial Priests should have a sufficient Maintenance, which the Monks would be sure to lessen as they saw occasion; and therefore another Decretal was made; that their Maintenance should not be diminished without the Bishop's Consent, and that all Customs and Privileges by which the Monks held the appropriated Tythes should be void; where the Secular Clergy had not a competent Subsistence.

'Tis observable, that in most of these Appropriators to Monasteries, the Right of Presentation was in the Monastick Body; but the Bishop had Power to refuse their Clerk, unless they would consent he should have such a sufficient Maintenance as he should think fit.

This made them so fullen, that they would not Present upon an Avoidance, which occasioned the making another Decretal; *viz.* That if they neglected, the Bishop should have Power to Collate:

Before the Monks became Rich by these Tythes; and other Endowments, they had a competent share of Learning, and their Monasteries were the only Universities where the liberal Arts

were taught, and therefore the best Men retired thither; for the Nobility, as well as private Persons, chose rather to make themselves, and their Children, Monks, than to educate them in a Military Life: And such was the Superstition of that Age, that if a Prince was very Vitious, or had committed any barbarous Act of Cruelty, it was accounted a sufficient Attonement for his Crimes to build a Monastery.

King *Edgar*, who was guilty of as great Excesses, both in Lust and Cruelty, as any of his Predecessors, was, by the Monkish Writers, applauded for a Wise and Religious Prince, because he built Forty Seven Monasteries, (1) and had he lived, would have built Three more to make up Fifty, the Number of *Jubilee*; and tho' he invaded their Privileges, (for he took a Nun out of the Cloyster at *Wilton* and debauched her) yet because he turned the Secular Clergy out of their Benefices, upon pretence that they were married, and put Regulars into their Livings, therefore he was esteemed a Saint.

From the Reign of King *Edgar*, to the Time of *H. 8.* Monks had been encreasing here; it was settled in some of the great Cathedrals, but 'tis certain that the Monks had the greatest Revenue of the Church in their Power; this made them Idle and Lascivious, and by consequence despised by good and learned Men, and they on the contrary disparaged all manner of Learning as the Foundation of Heresies and other Mischiefs.

They were called in the *Language* of that *Time* lubburly Sots; and the old Poets give us their Character in the Description of Sloth, and particularly *Robert de Langland*, whose Verses, for the Curiosity of them, I shall transcribe;

*I have been Priest and Parson passing Thirty Winter,
Yet can I neither sol fane sing, ne Sainis Lives read;
But I can find in a Field or in a Furlong an Hare,
Better then in Beatus vir or in Beati omnes.*

But to come nearer the Reformation, the Corruption of the Manners of the Monks was then so great, that to relate many of their Crimes would look more like a Libel than Truth, therefore I shall only mention a few and no more.

And first, as to their Incontinency, tho' they were engaged by a solemn Vow to be Chaste; yet if they called on God to assist them in mortifying the Desires of the Flesh, it was in the Prayer of *St. Austin* before his Conversion, *viz. Lord give me Continency and Chastity, but not too soon.*

But to shew how little they regarded this part of their Vow, Incontinency was encouraged at *Rome*, where Popes built Bawdy-Houses, which brought in an yearly Revenue of 20000 Ducats; and this was so strictly appropriated to their *Ecclesiasticks*, that the Rent of Pimping was accounted part of the Revenue

(1) *B. H. R.* 1 Pl. 22.

of the Church, and thus computed, viz. * a Churchman hath Two Benefices of Twenty Ducats, a Priory of Forty, and Three Curtezans in a Bawdy-House, who bring him Twenty Julios a Week.

Volateran tells us, that *Innocent VIII.* publicly gloried in the Number of his Bastards, which gave occasion to *Marullus* to compose this Epitaph on him;

*Spurcities, gula, avaritia, atque ignavia deses,
Hoc, O Æve, jacent quo regeris tumulo.*

Then as to their *Drinking*, as Bread made of the finest Flower was called *Chapter-Bread*, so the best Wine was called *Theological-Wine*; of which some Priests drank so plentifully, that they could not Preach: † *Paræus* gives us an instance of One who drank so much on the *Easter-Eve*, that he slept in the Pulpit the next Morning; and not rising to perform his Office, the People thought it to be an extraordinary Fit of Devotion, but the Sexton waking him, he swore *per Sacramentum* he could not Preach.

It must certainly be an Age of great Ignorance and Credulity, when Men, who were guilty of such scandalous Crimes, could impose so far on the People, as to make their Devotion serve for a standing Revenue for the Priests; but at that Time the Men were more Superstitious than the Women of *Israel* were in former Ages, who had rather give up their very Ear-Rings than want a golden Calf; and lest their Devotion should cool, the Priests and Monks, who were the Managers of all religious Affairs, found it necessary to give Fire to their Zeal by inventing new Miracles, which, together with the Pomp of Ceremonies, the Canonization of new Saints, and leading their Votaries with Relicks, made them run madding after Processions, till Men began to reassume their Reason, and Knowledge returned to the Laity, which happened about the Time of the Reformation.

And then this *Ignorance* and *Viciousness* of the Monks was sufficiently exposed by *Erasmus* and others; and our *K. Henry VIII.* who was designed for the Archbishop of *Canterbury*, and for that purpose being bred a Scholar, did naturally love Learning, and by consequence must have a very mean Opinion of those illiterate Men who enjoyed great Revenues, and lived in all manner of Sensualities, insomuch that at the general Visitation in his Reign, there were such shameful Discoveries of the Incontinency and Sodomy of the Monks and Fryars, that in the Priory of the *Benedictines* at *Canterbury*, there was evident Proof of Nine Sodomites, and of Fifteen more in *Battel-Abby* in *Sussex*, and so in many other Monasteries and Priors, besides married and single Women whom they debauched; so that upon the Visita-

* *Corn. Agrippa*, Fol. 135. † *Paræus in vita patris*, Fol. 26.

tation of about 600 of their Convents, together with the *Mendicants* in this Kingdom, a (*m*) Writer in those Days declared, that he would leave it to the Reader to guess how many Bastards they begot every Year for the Laity to maintain.

Therefore since Learning was no longer to be found in those Places, where all sorts of Vice and Debaucheries did abound, that wise King encouraged Cardinal *Woolsey* to build Two Colleges, which he did, viz. One at *Oxford*, and the other at *Ipswich*, where he was born; and that these Colleges might be sufficiently endowed, it was thought as justifiable in that Age to suppress some Monasteries, and annex their Revenues to those new-built Foundations, as it was in the foregoing Ages to turn out the poor Secular Clergy, and to place the Regulars in their Benefices, for the same Estate was still employed to religious Purposes; and this was the beginning of the Suppression of some Monasteries, and the total Dissolution of them followed in that Reign.

| The Names of Monasteries and Priories. | In what Counties. | When Found-ed, An. | Of what Or-der. | Of what Va-lue per Ann. |
|--|-------------------|--------------------|------------------------|-------------------------|
| <i>Abington Ab.</i> | <i>Berks</i> | 821 | <i>Benedictines</i> | 1876 00 00 |
| <i>Abboibbury</i> | <i>Dorset</i> | 1016 | <i>Benedictines</i> | 390 19 02 |
| <i>St. Albans Ab.</i> | <i>Hertford</i> | 793 | <i>Benedictines</i> | 413 14 11 |
| <i>Ambersburg Ab.</i> | <i>Wilts</i> | 1177 | <i>Benedictines</i> | 494 15 2 |
| <i>St. Andrews Pr.</i> | <i>Northam.</i> | 1067 | <i>Cluniacks</i> | 263 7 1 |
| <i>Ashrugg Coll.</i> | <i>Bucks</i> | Ed. 1. | <i>Can. St. Austin</i> | 416 16 4 |
| <i>Barndney Ab.</i> | <i>Lincoln</i> | 712 | <i>Benedictines</i> | 366 6 1 |
| <i>Barnewelt Pr.</i> | <i>Kent</i> | H. 1. | <i>Can. St. Austin</i> | 256 11 10 |
| <i>Bartholomew</i> | <i>Smithfield</i> | 1102 | <i>Can. St. Austin</i> | 653 15 00 |
| <i>Bath Abby</i> | <i>Somerset</i> | H. 3. | <i>Benedictines</i> | 617 2 8 |
| <i>Berking Ab.</i> | <i>Essex</i> | 680 | <i>Benedictines</i> | 862 12 2 |
| <i>Bellavalla Pr.</i> | <i>Nottingh.</i> | 16 Ed. 3. | <i>Carthusians</i> | 227 8 0 |
| <i>Belland Ab.</i> | <i>Tork</i> | 1134 | <i>Cisterians</i> | 238 9 4 |
| <i>Bermondsey Ab.</i> | <i>Surry</i> | 7 H. 1. | <i>Can. St. Austin</i> | 474 14 4 |
| <i>Birlington</i> | <i>Tork</i> | H. 1. | <i>Can. St. Austin</i> | 547 6 11 |
| <i>Bodmin Priory</i> | <i>Cornwall</i> | 936 | <i>Can. St. Austin</i> | 270 00 11 |
| <i>Bolton in Craven Pr.</i> | <i>Tork</i> | H. 1. | <i>Can. St. Austin</i> | 212 13 4 |
| <i>Bordesly Ab.</i> | <i>Worcester</i> | 1138 | <i>Cisterians</i> | 388 9 10 |
| <i>Boxley Ab.</i> | <i>Kent</i> | 1144 | <i>Cisterians</i> | 204 4 11 |
| <i>Bradstock Pr.</i> | <i>Wilts</i> | T. Conq. | <i>Can. St. Austin</i> | 212 19 3 |
| <i>Brewton Ab.</i> | <i>Somerset</i> | T. Conq. | <i>Can. St. Austin</i> | 439 6 8 |
| <i>Bristol Ab.</i> | <i>Gloucester</i> | H. 1. | <i>Can. St. Austin</i> | 670 13 11 |
| <i>Buckland Pr.</i> | <i>Somerset</i> | Ed. 1. | <i>Cisterians</i> | 223 7 4 |
| <i>Buckfast Ab.</i> | <i>Devon</i> | H. 2. | <i>Cisterians</i> | 466 11 2 |

(*m*) *H. Stephen*, i cap. 21. *Selden*, on *Polyalb.* 187.

The

Monks and Monasteries.

405

| The Names of Monasteries and Priors. | In what Counties. | When Found- ed, Ann. | Of what Or- der. | Of what Va- lue per Ann. |
|--|----------------------|----------------------------|---------------------|-----------------------------|
| Burton on Trent Ab. | Stafford | K. Edg. | Benedictines | 267 14 3 |
| Bustlesbam Ab. | Berks | 13 Ed. 3. | Can. St. Austin | 285 00 00 |
| Butley Ab. | Suffolk | 1171 | ditto. | 318 17 2 |
| Carlisle Pr. | Cumberl. | W. Rufus | ditto. | 418 3 4 |
| Castle-Ave Ab. | Norfolk | 1092 | Cluniacks | 306 11 4 |
| Cerne Ab. | Dorset | K. Edg. | Benedictines | 515 17 10 |
| Charter-house | | 1372 | Carthusians | 726 2 7 |
| Chertsey Ab. | Surry | 666 | Benedictines | 659 10 8 |
| Chickland Pr. | Bedford | W. 2. | White Canons | 212 3 5 |
| Cirencester Ab. | Gloucester | H. 1. | Can. St. Austin | 1051 7 1 |
| St. Clare | wt. Algate | 1292 | | 1418 8 2 |
| Clarkenwell Pr. | | K. Step. | Benedictines | 262 19 00 |
| Colchester Ab. | Essex | H. 1. | Can. St. Austin | 523 17 00 |
| Comb. Ab. | Warwick | K. Step. | Cisterians | 371 15 1 |
| Combermere Ab. | Cheshire | 1134 | ditto. | 225 9 7 |
| St. Cross Ab. | Stafford | 1153 | ditto. | 227 5 00 |
| Croyland Ab. | Lincoln | 716 | Benedictines | 1803 15 1 |
| Croxden Ab. | Leicester | R. 1. | Premonstratens. | 385 00 10 |
| Croxden Ab. | Stafford | | Cisterians | |
| St. Cuthbert Ab. | Durham | 842 | Benedictines | 523 17 00 |
| Darby Ab. | Derbysh. | H. 2. | Can. St. Austin | 258 14 5 |
| Dartford Ab. | Kent | 46 Ed. 3. | ditto. | 380 00 00 |
| Dinkswell Ab. | Devon | 1201 | Cisterians | 294 18 06 |
| Dorchester Ab. | Oxon | 635 | Can. St. Austin | 219 12 00 |
| Dunstable Ab. | Bedford | H. 1. | ditto. | 344 13 3 |
| Edington Pr. | Wilts | 1352 | ditto. | 442 9 7 |
| Edmondsbury A. | Suffolk | 1020 | Benedictines | 1652 13 11 |
| Finsham Ab. | Oxon | K. Eth. | ditto. | 441 12 2 |
| Elmeston Ab. | Bedford | W. 1. | ditto. | 284 12 11 |
| Epworth | Lincoln | W. R. 2. | Caribus Monks | 237 15 2 |
| Fair-place Ab. | Hamps | 1204 | Cisterians | 326 13 2 |
| Farley | Wilts | 1125 | Cluniacks | 217 00 4 |
| Feverham Ab. | Kent | 1147 | ditto. | 286 12 6 |
| Ford Ab. | Devon | 1133 | Cisterians | 374 10 6 |
| Fountain Ab. | York | 1132 | ditto. | 998 6 8 |
| Furnes Ab. | Lincoln | 1127 | ditto. | 805 16 5 |
| St. German Ab. | Cornwall | Abelst. | Can. St. Austin | 243 8 0 |
| Glaffenburg Ab. | Somerset | 300 | Benedictines | 3311 7 4 |
| Gloucester Ab. | Gloucester | 680 | ditto. | 1946 0 0 |
| Gisburn Ab. | Tork | K. Step. | Can. St. Austin | 628 3 4 |
| Godstow Ab. | Oxon | K. Step. | Benedictines | 294 5 10 |
| Hales Ab. | Gloucester | 1246 | Cisterians | 257 7 8 |
| Hales-Owen Ab. | Worcester | K. John | Premonstratens. | 282 13 4 |
| Hales-Owen Ab. | Salop | K. John | ditto. | 337 15 6 |

| The Names of Monasteries and Priors, | In what Counties. | When Found- ed, Ann. | Of what Or- der. | Of what Va- lue per Ann. |
|--|----------------------|----------------------------|---------------------|-----------------------------|
| Hagbmond Ab. | Salop | 1100 | Can. St. Austin | 259 13 7 |
| Hertland Ab. | Devon | H. 2. | Cisterians | 294 18 6 |
| Hide Ab. | Hants | K. Alfr. | Benedictines | 865 18 0 |
| Hinton Pr. | Somerset | H. 3. | Carthusians | 248 19 2 |
| Holmcoliron Ab. | Cumberla. | 1135 | Cisterians | 427 19 3 |
| Holynell | Lon. &c. | 1318 | Black Monks | 347 15 6 |
| Hulme Ab. | Norfolk | K. Canut | Benedictines | 583 17 0 |
| Jervall Ab. | Tork | K. Steph. | Cisterians | 234 18 5 |
| John of Jerusal. | | H. 1. | | 2385 12 8 |
| Ixworth Pr. | Suffolk | Temp. | Can. St. Austin | 280 9 5 |
| Kynsham Ab. | Somerset | H. 1. | ditto. | 419 14 3 |
| Kennelworth Ab. | Warwick | H. 1. | ditto. | 538 19 0 |
| Kingswood | Gloucester | 680 | Benedictines | 244 11 2 |
| Kirkham Ab. | Tork | H. 1. | Can. St. Austin | 239 9 4 |
| Kirkstall Ab. | Tork | H. 1. | Cisterians | 329 2 11 |
| Kirksted Ab. | Lincoln | 1139 | ditto. | 286 2 7 |
| Lacock Ab. | Wilts | 1232 | Can. St. Austin | 203 12 5 |
| Lanibony Pr. | Gloucester | 1136 | ditto. | 649 19 11 |
| Landa Ab. | Leicester | W. Ruf. | ditto. | 399 3 3 |
| Launceston Ab. | Cornwall | W. 1. | ditto. | 354 0 11 |
| Ledis Pr. | Kent | 1119 | ditto. | 362 7 7 |
| Lenton Pr. | Nottingh. | H. 1. | Cluniacs | 329 5 10 |
| Leicester Ab. | Leicester | 1143 | Can. St. Austin | 951 14 5 |
| Lillyshall Ab. | Salop | Adelsfed | King of Mercia | 229 3 1 |
| Lincoln Pr. | | H. 2. | | 202 5 0 |
| London Minors | | Ed. 1. | Benedictines | 318 8 5 |
| London House | | Ed. 3. | Carthusians | 642 0 4 |
| Malmesbury | Wilts | 670 | Benedictines | 803 17 7 |
| Malvern Ab. | Worcester | 1083 | ditto. | 308 1 5 |
| St. Mary Bish. | Pr. | 1187 | | 478 6 6 |
| St. M. Ov. Ab. | | 7 H. 1. | Can. St. Austin | 624 6 6 |
| St. Mary Tork A. | Tork | W. Ruf. | Benedictines | 1550 7 0 |
| Mauling Ab. | Kent | K. Edm. | ditto. | 218 4 2 |
| Maulton Ab. | Tork | K. Steph. | | 237 7 0 |
| Melsam Ab. | Tork | 1136 | Cisterians | 299 6 4 |
| Merryual Ab. | Warwick | 1148 | ditto. | 254 1 8 |
| Merion Pr. | Surrey | 1121 | Can. St. Austin | 957 19 5 |
| St. Mich. Hull. | Tork | 1377 | Carthusians | 231 17 3 |
| Middleton Ab. | Dorset | Eibelft. | Benedictines | 578 13 11 |
| Michelney Ab. | Somerset | 740 | ditto. | 447 4 11 |
| Missenden Ab. | Bucks | 1293 | ditto. | 261 14 6 |
| M. Burton Ab. | Tork | 1186 | Cluniacs | 239 3 6 |
| Moungre Ab. | Tork | 1396 | Carthusians | 323 2 10 |
| Neots Ab. | Hunting | Hen. 1. | Benedictines | 241 11 4 |
| Newark Pr. | Surrey | | | 258 11 11 |

| The Names of Monasteries and Priories. | In what Counties. | When Found- ed, Ann. | Of what Or- der. | Of what Va- lue per Ann. |
|--|----------------------|----------------------------|---------------------|-----------------------------|
| Newham Ab. | Devon | 1246 | Cisterians | 227 7 8 |
| Newburg Pr. | Tork | 1145 | Can. St. Austin | 367 8 3 |
| Newbam Pr. | Bedfordsh. | Hen. 1. | ditto. | 293 5 11 |
| Newsted Pr. | Nottingh. | Edw. 3. | ditto. | 219 18 8 |
| Noteley Ab. | Buck | Hen. 1. | ditto. | 437 6 8 |
| Nossel Ab. | Tork | Hen. 1. | ditto. | 492 18 2 |
| Nuneaton Mon. | Warwick | Hen. 2. | Benedictines | 258 14 5 |
| Osney Pr. | Oxon | Hen. 1. | Can. St. Austin | 654 10 2 |
| Oswich Ab. | Essex | 1120 | ditto. | 677 1 2 |
| Oxford Pr. | Oxon | Anie. | Conquestum | 224 4 8 |
| Peterborough Ab. | North'ron | | Benedictines | 1721 14 0 |
| Peribore Ab. | Worcest. | 1138 | Cisterians | 643 4 3 |
| Pipewell Ab. | North'ron | 1143 | ditto. | 286 11 8 |
| Plimpton Ab. | Devon | Edw. 1. | ditto. | 241 17 9 |
| Pomfret Ab. | Tork | T. Conq. | Cluniacks | 337 14 8 |
| Ramsay Ab. | Hunting. | 968 | Benedictines | 1716 12 4 |
| Reading Ab. | Berks | Hen. 1. | ditto. | 1988 14 3 |
| Reverley Ab. | Lincoln | 1142 | Can. St. Austin | 287 2 4 |
| Rival Ab. | Tork | 1132 | Cisterians | 278 10 2 |
| Risbal | Tork | | | 351 14 6 |
| Rochester Ab. | Kent | 600 | Benedictines | 486 11 5 |
| Rock Ab. | Tork | 1147 | Cisterians | 224 2 5 |
| Rumsey Ab. | Hampsh. | 907 | Benedictines | 293 10 10 |
| Selby Ab. | Tork | T. Conq. | ditto. | 729 12 10 |
| Sempringham A. | Lincoln | 1048 | Gilbertines | 317 4 1 |
| Shafton Ab. | Dorset | 941 | Benedictines | 1166 8 9 |
| Shene Pr. | Surrey | 1414 | Carthusians | 777 12 0 |
| Sherborne Ab. | Dorset | 370 | Benedictines | 682 14 7 |
| Shrewsbury Ab. | Salop | 1081 | Can. St. Austin | 615 4 3 |
| Sibeton Ab. | Suffolk | 1150 | Cisterians | 250 15 7 |
| Sion Ab. | L. & M. | Hen. 5. | Can. St. Austin | 1731 8 4 |
| Smithfield E. A. | Hampsh. | 34 E. 3. | Cisterians | 602 11 10 |
| Southwick Pr. | | Hen. 1. | Can. St. Austin | 257 4 4 |
| Spalling Ab. | Lincoln | 1052 | Benedictines | 761 8 11 |
| Stratford Ab. | Essex | 511 | Cisterians | 511 16 3 |
| Sulby Ab. | North'ron | K. Steph. | Praemonstratens. | 258 8 5 |
| Strata Florida | Cardigan | T. Conq. | | 1226 6 0 |
| St. Swithun | Winchell. | 634 | Benedictines | 1507 17 2 |
| Tarrent Ab. | Dorset | Hen. 3. | Cisterians | 214 7 9 |
| Tauistock Ab. | Devon | 961 | Benedictines | 902 5 7 |
| Taunton Pr. | Somerset | Hen. 1. | Can. St. Austin | 386 8 10 |
| Thame Ab. | Oxon | Hen. 1. | Cisterians | 256 13 11 |
| Tewksbury Ab. | Gloucest. | 715 | Benedictines | 1598 1 3 |
| Therford Ab. | Norfolk | 1103 | Cluniacks | 312 14 4 |
| Thornley Ab. | Kent | 972 | Benedictines | 411 12 11 |

| The Names of Monasteries and Priors. | In what Counties. | When Found- ed, Ann. | Of what Or- der. | Of what Va- lue per Ann. |
|--|----------------------|----------------------------|---------------------|-----------------------------|
| Thornton Ab. | Lincoln | 1139 | Can. St. Austin | 594 7 10 |
| Thurgarton Pr. | Nottingh. | Hen. 1. | ditto. | 259 9 4 |
| Trickfield Ab. | Hampsh. | Hen. 3. | Premonstratens. | 242 16 1 |
| Tinmouth | Durham | | | 397 11 5 |
| Tinmouth Pr. | Northumb. | A Cell 10 | St. Albans | 511 4 1 |
| Torre Ab. | Devon | Rich. 1. | Premonstratens. | 369 11 0 |
| Twincham Pr. | Hampsh. | 1042 | Can. St. Austin | 326 13 2 |
| Vale Holy Cross | Denbysb. | Edw. 1. | Cisterians | 214 3 5 |
| Walton Ab. | Tork | | | 360 16 10 |
| Waltham Ab. | Essex | K. Steph. | Gilbertines | 900 4 3 |
| Walden Ab. | Essex | 1060 | Can. St. Austin | 372 18 1 |
| Walsingham Ab. | Norfolk | 1136 | Benedictines | 391 11 7 |
| Walter Pr. | Tork | K. Steph. | Can. St. Austin | 221 3 10 |
| Warden Ab. | Bedford. | H. 1. | ditto. | 389 16 6 |
| Warson Pr. | Nottingh. | 4 Steph. | Cisterians | 239 10 5 |
| Welbeck Ab. | Nottingh. | | Can. St. Austin | 249 6 8 |
| Wenlock Pr. | Salop | 1181 | ditto. | 401 7 0 |
| St. Werburgh. | Cheshire | 1095 | | 3 5 11 |
| West Deerham. | Norfolk | H. 2. | Cluniacs | 228 0 0 |
| Westminster | | K. Edg. | Premonstratens. | 3471 0 2 |
| Westacre Ab. | Norfolk | W. Ruf. | Benedictines | 260 13 7 |
| Whale Ab. | Lancast. | 1172 | Cluniacs | 331 9 1 |
| Wisby Ab. | Tork | T. Conq. | Benedictines | 437 2 9 |
| Whorwill Ab. | Hampsh. | K. Edg. | ditto. | 339 8 7 |
| Wigmore Ab. | Salop | 1172 | Can. St. Austin | 267 2 10 |
| Wilson Ab. | Wilsh. | K. Eth. | Benedictines | 601 1 1 |
| Winchcomb Ab. | Gloucester | 787 | ditto. | 391 18 2 |
| Witham Pr. | Somerset | H. 2. | Carthusians | 215 15 0 |
| Wooburn Ab. | Bedford | K. John | Cisterians | 391 18 2 |
| Wymundham Ab. | Norfolk | 1139 | Benedictines | 211 16 6 |

There were many other Monasteries of less Value, viz. Under 200 l. per Annum, of which 376 were dissolved by Act of Parliament, Anno 27 H. 8. cap. 28. but there was a Proviso in that Statute to enable the King to continue any of them by his Letters-Patents, as he should think fit.

By Virtue of this Proviso, some of the lesser Monasteries were continued, and so were not actually dissolved till the 31 H. 8. cap. 13. in which Act there is a Clause that the King should have their Lands in as large and ample Manner as the Governors of those Monasteries held them, in Right of their Houses, and that such of their Lands, which before the Dissolution were discharged of Tythes, should continue; but Tythes were not mentioned in the first Statute.

There

There is another Clause, by which the Monasteries to be dissolved, together with their Revenues, should be in the actual Possession of the King, in the same *State and Condition as they then were, saving the Rights of all others.*

'Tis to be observed that this Parliament began 28 April 31 H. 8. and that in August following the Abbot of * *Ramsay*, with the Assent of his Convent, granted the next Presentation of the Church of *Upwell* to Sir *Edward Montagne*, Chief Justice of the Common-Pleas, they being seised of the Advowson thereof in Right of their said Monastery; that in November afterwards they surrendered the said Monastery to the King; but it was held that the Grant to the Chief Justice was void; for the King having the Possessions of the Monastery in the same *State and Condition as they then were*, those Words must refer to the Commencement of the Parliament, and that the Abbot could make no Grant afterwards; and that the *Saving* did not extend to any Title, but to such which were in Being before the Act commenced.

Now, where any of those Monasteries were continued by Virtue of the King's Letters-Patents, whose Lands were discharged of Tythes by the Privilege of any Order of Monks, they retained the same Privilege at the Time of the Dissolution, by the Statute 31 H. 8. for 'tis expressly enacted that they should continue so discharged.

But the Lands belonging to those Monasteries which were dissolved by the Statute 27 H. 8. and not continued by the King's Grant, did lose this Privilege to be discharged of Tythes, because, immediately upon the Dissolution, &c. the Right of Tythes did revert to the Secular Clergy, who had been unjustly deprived of the same; and the Clause in the Statute 31 H. 8. did not extend to any Lands that were actually dissolved by the Act 27 H. 8.

And even when these Lands were discharged of Payment of Tythes, it was only whilst they were in the Owner's Hands, and not when leased to Tenants; therefore, if any were in Lease at the Time of the Dissolution, &c. when those Leases expired, the King was to hold them discharged of Tythes, and so were his Tenants, because of the Prerogative of his Person, who could not be presumed to be employed in Affairs of Husbandry.

His Grantees likewise held them discharged of Tythes, (a) but not their Tenants, for they were intended to be proper Persons for such Employments.

But none of the Lands of those Religious Houses, which came to the Crown (b) after the Statute 31 H. 8. are exempted from Payment of Tythes, because they can have no Benefit of that Clause of Discharge, which is contained in the Act; so

* Dyer 231. Bendl. 211. Moor 913. 2 Rep. 47. a.

(a) Dyer 277. (b) 2 Cro. 57. that

that all Lands must pay Tythes, but only such as were discharged from the Payment thereof before the Statute 31 H. 8. and which came to the Crown by Virtue of that Act, that being the only Statute Law which discharges such Lands, &c. tho' this is not very clear in our Books.

'Tis true, the *Lands* of the *Hospitallers*, who had a special Privilege to hold the same discharged of Tythes, came afterwards to the Crown, viz. By the Statute 32 H. 8. and the King had them in as ample Manner as the Abbot; and hereupon a Question did arise:

Anno 2 Jac. in the Case of * *Cornwallis and Spurling*, it was adjudged that the Statute 31 H. 8. extended only to such religious Houses which had been surrendered to the King since 4 Feb. 27 H. 8. all which were vested in him by that Statute, with a Clause, That such Lands which belonged to those Houses before they came to the Crown, or before the Dissolution discharged of Tythes should so continue.

Now, because there was no such Clause in any of the subsequent Acts, viz. In the Act 32 H. 8. which gave the Lands of the *Hospitallers*, in the Act 37. H. 8. which gave the *Chantries*, and in the Act 1 Ed. 6. which gave the free *Chappels* to the King; therefore this being a personal Privilege, which was vested in those Orders of Men, shall be lost by the Dissolution of their Corporations, and their Lands shall pay Tythes, for so it was adjudged in that Case, and so it was adjudged in the † *Archbishop's Case*; but *Anno 4 Car.* the like Question coming in Debate again in the Case between || *Whitton and Weston*, there we have a contrary Judgment, viz. That such Lands shall be discharged of Tythes; for tho' there is no Clause of Exemption in any of those subsequent Statutes, yet this Privilege being given to the King by the Statute 31 H. 8. shall extend as well to the Possessions of those religious Houses, which were dissolved after that Statute as before; for it enacts, that all Religious Houses dissolved, and to be dissolved, that is, which were in a Possibility to be dissolved according to that Act, shall be in the actual Possession of the King; and then follows the Clause of Exemption of Tythes.

Now, it is generally agreed, that if the Corporation had been only dissolved by the Statute 32 H. 8. their Lands had been vested in the Crown by the Statute 31 H. 8. but the first Act vesting them in the Crown, controls that of the 31 H. 8. and yet the Clause of Exemption in that Act shall extend to the Lands afterwards vested in the Crown, because it was a Privilege existing before the Dissolution.

* 2 Cro. 57. Moor 913. † 2 Rep. 47. || Jones 182.

Monuments.

MY Lord Coke tells us, That 'tis the last Work of Charity, which we can do for the Deceased, to build a Monument for him, (c) and that it may serve to several good Purposes, viz. To prove his Pedigree, to shew when he was Buried, and to put us in Mind of Mortality; and therefore 'tis call'd a Monument, because *Monet nos quod sumus Mortales*.

Now, tho' the Freehold of the Church or Churchyard where a Monument is erected may be in the Parson, yet those who build it, or the Executors, may have an Action on the Case against him who defaces it.

The first that we meet with in our Books was, Anno 9 Ed. 4. †† it was brought by the Lady Wych, against a Parson, for taking down a Coat-Armour of her Husband, Sir Hugh Wych, in the Chappel where he was buried; the Parson pleaded that he ought to take it down as due to him, being an Oblation; Telverton, who was then one of the Judges of B. R. told him, that he might as well take away his Bible, Carpet and Cushion, which he left in his Seat, and that nothing could be an Oblation but what was intended as such by the Giver; but that a Coat-Armour was set up by the Living, in Honour and Memory of the Dead.

Agreeable with this Year-Book was the Case between Coryon and Pym, which my Lord Coke cites to be adjudged in the Common-Pleas, Anno 10 Jac.

The Case is reported by Serjeant Moor, (d) but 'tis not to this Purpose; for it was, that a Man cannot prescribe to a Seat in the Body of the Church, because the Parson and Churchwardens have Power to dispose them to whom they think fit; but that he might prescribe to a Seat in an Isle, for that may be presumed to be built either by his Ancestor, or the Owner of the Land, &c.

'Tis true, my Lord Coke there cites the Lady Grey's Case, who set up her Husband's Arms and Helmet in the Church, and the Parson took them down; for which they brought an Action against him, and adjudged that it would lie, viz. It was an Action of Trespass brought by the Lady herself; and in his * *Comment upon Littleton* he tells us, that the Widow, or the Executors, who first set up any Monument, may have an Action against those who deface it in their Time; and both he and my Lord Rolls, from him, cite † Pym's Case, where it was held, that the Heir might bring an Action against those who either took it away, or defaced it; and the Reason is given by Justice ‖ Croke in the Case of Francis and Ley, which is repeated by

(c) 3 Inst. 202. †† 9 Edw. 4. 14. a. (d) Moor 878. 2 Rol. Abr. 288. * 1 Inst. 18. 1 Rol. Abr. 625. † Moor 878. ‡ 2 Rep. 104. Godb. 199. ‖ 2 Cro. 366. Noy 104.

Mr. *Noy* under the Name of *Day and Bedingsfeild*; for 'tis almost the same *in terminis*, viz. Because the Heir is inheritable as well to *Arms* as to *Heirlooms*; and the Year-Books 30 *Ed.* 3. 2. 9. 39 *Ed.* 3. 14. are cited to prove it, which I have searched, and find nothing there relating to it. My Lord * *Rolls* likewise cites *Pym's Case*, to be repeated in *Hob.* 95, but there is no such Case in that Page, or in the whole Book.

Mortmain.

THIS is where Lands are given to some Spiritual Person, or Corporation, and to their Successors; it was occasioned at first by the Monks persuading the ignorant People into the Belief of Purgatory, where the Souls of the Deceased might be relieved by Masses from those Torments, which otherwise they would suffer, and by the same Means would afterwards be relieved from them; and this made them give Lands to those Houses to find a Priest to say Masses every Day for their Souls.

And because such Lands were never to revert to the Donor, or his Heirs, and by that Means the Services and other Profits due for the same were Extinct, therefore it was called a Gift in *Mortua Manu*.

So great was the Superstition of former Ages, that these Monasteries would have got most of the Lands in *England*, if some Statutes had not been made to restrain such Gifts; the Purport of which were, viz. That Grants of Lands to Religious Houses should be void, if made *without the King's License*, that is, if they were held immediately of him; but if such Lands were held of an inferior Lord, then the License must be had both from the King and him.

If there was no such License, then whoever had the Inheritance might enter within a Year after the Alienation, and if he neglected, then the next immediate Heir might enter in half a Year, and if he did not, then the King might.

But these Statutes did not altogether prevent the Inconveniencies intended; for the Kings seldom refused to confirm such Grants, for if they did their Reigns would have been very uneasy.

Since the Reformation, there have been some Cases, but not many, concerning these Gifts in Mortmain: (e) I shall instance but one, viz. A Man devised his Lands to *Trinity-College* in *Cambridge*, for the Maintenance of a Scholar there; and he farther devised, that if any Cayil should hinder this Devise, or that the same should not go to the College, by Reason of the Statute of *Mortmain*, then he devised it to *Robert Newman* and his Heirs.

Upon an Information brought by the Attorney-General against *Newman*, the Lands were decreed to the College, by

* 2 Abr. 288. (e) 2 Lev. 284.

Virtue of the Statute 43 *Eliz.* as being a charitable Gift (f). 'Tis true, the Devise is void upon the Statute of Wills, because 'tis to a Corporation in Mortmain; but 'tis good upon the Statute of charitable Uses.

Mortuary.

THERE was a Duty paid at Funerals, by our *Saxon* Ancestors, which was called *Symbolum Anima*, or the *Saxon Soul-Shot*; and this Payment was not only enjoined by Councils, but by the Laws of *Canutus*, one of our *Danish* Kings.

It was due to that Church of which the Party deceased was a Member, and not to the Church where he was buried; the Payment was always made in Money; and some are of Opinion that this was the Original of Mortuaries, only with this Difference, by turning the Payment of Money into Goods; for in the Reign of *Hen. 2.* it became a settled customary Duty for a Freeholder to give his best Goods as an Heriot to the Lord, of whom he held his Lands; and that which was next to the best was to be given to the Church where the Party had received the Sacrament.

It was acknowledged by Archbishop *Winchelsea*, in the Reign of *Ed. 1.* to be an ancient Right due to the Church; and by a Provincial Constitution made in his Time, it was supposed to be due for Tythes and Oblations, which had been neglected to be paid by the Deceased; and therefore to settle a reasonable Compensation in such Case, it was decreed, that where there was a Choice of Three Things, the Second-best should be paid for a Mortuary.

The like was decreed by several Councils afterwards, and particularly in a Provincial Council, in the Time of Archbishop *Langham*, Anno 1 *R. 2.* where amongst other Things it was decreed, that if a Feme-Covert died in the Life-time of her Husband, she should not pay a Mortuary.

And it was not only Customary to pay this Duty, but it was usual to bring it to the Church when the Corps was buried, and then to offer it as a Satisfaction for the supposed Negligence in substracting Personal Tythes; (g) and from hence, as Mr. *Selden* tells us, it was called a *Corse Present*.

But Custom obtained against these very Decrees; for by the Statute *Circumspette Agatis*, which was made at the same Time, the Payment of a Mortuary was left to Custom, viz. That it should be paid *ubi dari consuevit*; and from hence my Lord *Coke* (b) infers, and very rightly, that a Mortuary is not due by Law, but by Custom.

And this appears very plainly by the Statute 21 *H. 8. cap. 6.* which is now the standing Law against Mortuaries, viz. The Preamble cites, *That Doubt and Questions had been made, not only*

(f) *Mob. 136.* (g) *Hist. Tythes 187.* (b) 2 *Inst. 491.*

upon the Manner and Form of Demanding, but of the Quantity and Value of Mortuaries; and therefore it was Enacted, That no Person should demand a Mortuary, where by Custom it hath not usually been paid, nor by the Death of a Feme-Covert; and in this Respect that Law was conformable to the aforefaid Conftitution.

It was further Enacted, That it should not be demanded on the Death of a Child, or of a Person who was not an House-keeper, or of a Traveller; or of one not refiding in the Place where he died, nor where the Goods of the Deceased were not of the Value of 10 Marks, his Debts being deducted; and that no Person shall take above 3 s. 4 d. where the Goods did not exceed 30 l. nor above 6 s. 8 d. where they exceed 30 l. and not 40 l. nor above 10 s. where they amount to 48 l. or more, under the Penalty of forfeiting so much as he takes or Demands more, and likewise 40 s. to the Party grieved, to be recovered by Action of Debt; and that if the Person should happen to die in the Place where he did not dwell, the Mortuary must be paid where he did most commonly Live; and that such Mortuaries which had then been settled by Custom, if less than above-mention'd, should not be altered.

Anno 11 Eliz. an Action of Debt was brought on this Statute against a Person for taking 3 s. 4 d. when the Goods of the Party deceased did not amount to 10 Marks; the Defendant *Protestando*, that the Deceased had Goods above that Value at the Time of his Death; and also *Protestando*, that the Declaration was insufficient, did then plead that he did not take 3 s. 4 d. for a Mortuary *Contra formam Statuti*; upon this Plea they were at issue, which was tried at the Assizes at Oxford, and the Plaintiff had a Verdict; the Pleadings are at large in my Lord Coke's Entries 164.

Before this, it was the common Opinion, That a Mortuary could not be recovered but in the Spiritual Court; and that if a Prohibition was brought, Consultations in such Cases had always been granted; so in *Fitzherbert (i)* in his *Natura Brevium*, viz. Where Custom is alledged for the Payment of a Mortuary, it shall be tried in the Spiritual Court; and the Reason is, because that Court had the original Cognizance of Mortuaries, and therefore it was held reasonable that all Dependencies on it should be tried there.

I cannot deny but that there are some Cases in the old Books which tend this Way, as Anno 10 H. 4. *Plito 2. (k)* A *Pramunire Facias* was brought against the Vicar of S. for suing in the Spiritual Court for an Heifer, &c. pleaded a Custom in the Parish, to have the best Beast for a Mortuary of every Parishioner dying there; and that such a Person died possessed of the Heifer which the Vicar would have seised, but the Plaintiff privately drove it away, and thereupon the Vicar sued him in the Spiritual Court to produce it; now, tho' it was objected that this was only a Chattel, and the Question was only about the Pos-

(i) F. N. B 51, 53. (k) Fitz. J. 38.

sessione

session, and for that Reason it ought to be tried at Law; yet the Plea was held good, because the Temporal Courts had no Jurisdiction of Mortuaries, nor of any of its Dependencies.

So *Anno 2 H. 5. 10.* in Trespass for taking an Horse, the Defendant pleaded to the Jurisdiction of the Court, for that he was Vicar of G. and the Plaintiff was Parson of the same Church; and that R. a Parishioner died possessed of the Horse which the Vicar took as a *Mortuary*; now, this had been a good Plea, if the Property of the Horse had been admitted to be in the Parishioner at the Time of his Death; but that was denied, for he had only the Possession, and the Plaintiff claimed the Property.

More Cases might be cited to this Purpose, but since the Statute, the Law hath been adjudged to be otherwise; for if the Custom is denied, it shall be tried at Common Law, (a) and a Prohibition shall be granted, unless the Suit is for so much Money due for Mortuary; and the Plaintiff suggests that the *Quantum* is settled by the Statute, but doth not alledge 'tis of a less Value; for in such Case no Prohibition shall go, because the Statute doth not take away the Jurisdiction of the Spiritual Court.

So, if 'tis admitted that a Mortuary (b) is due by Custom, but the Parties differ to whom it ought to be paid, whether to the Impropiator or Vicar, a Prohibition shall not be granted, because the Custom is admitted.

But where the Custom is denied it shall be tried at Law, (c) because Customs are Part of the Law of the Land; therefore, where 'tis alledged *de modo decimandi*, (d) it shall be tried at Common Law.

When the second-best Thing was to be paid for a Mortuary, it was lawful for the Party to seize it where he could find it; but since Mortuaries are now reduced to a certain Sum of Money, where due by Custom, it seems reasonable that an Action of Debt should lie for the Recovery of such a Duty; but 'tis plain that such an Action will lie for the Forfeiture of 40s. to the Party grieved, and for so much more as was taken from him beyond the Value mentioned in the Statute; and of such an Action we have a Precedent in my Lord Coke's Entries. (e)

Ne Admittas.

THIS is a judicial Writ directed to the Ordinary, and may be brought, either by the Plaintiff or Defendant, in a *Quare Impedit*; and 'tis to command him not to admit the Clerk of the other Party *Pendente Lite*.

(a) Cro. Eliz. 151. Cro. Car. 238. 3 Mod. 268. (b) Sid. 263. (c) 2 Lut. 1069. (d) 2 Rol. Abr. 307. 13 Rep. 18, 37. (e) Co. Entr. 164.

If the Bishop should admit the Clerk, notwithstanding this Writ, and the Party should recover in the *Quare Impedit*, he may then bring a *Quare Incumbavit* * against him, and remove the Clerk which came in pending the Action, by any Title whatsoever; and if 'tis found by Verdict, that the Bishop did incumber the Church after the *Ne Admittas* delivered, and within Six Months after the Avoidance, the Jury may award Damages; but his Temporalties are not to be seised for this Contempt, as they may upon an Attachment, or a Prohibition.

The Clerk thus removed, tho' he hath a Right, shall never recover it but by a *Quare Impedit*; but if no Writ of *Ne Admittas* is brought, then if the Clerk of a Stranger should come in *Pendente Lite* by a good Title, he shall hold it.

This Writ must be brought in the County where the Church is, and within Six Months after the Avoidance, for otherwise the Bishop will have a Title to present by Lapse; but 'tis very rarely brought, because, since the Reformation, the Bishops shew no manner of Partiality in Admissions, which was usual before.

New Stile.

UNDER this Title I shall give a short Account of the Christian Epochs.

Egypt being conquered by *Julius Caesar*, and the People there being very expert in Astronomy, he brought from thence a more perfect Account of the Solary Year, than what was used or known amongst the *Romans*.

It was first drawn up by *Sosigenes*, and published by *Julius Caesar*, 45 Years before the Birth of our Saviour, and from him 'tis called the *Julian Year*; it was ordered by him to be observed throughout the Empire, of which *England* was then a Province; and this Account is still retained here, and called by the Name of Old Stile, which is thus:

The Year was supposed to consist of 365 Days and 6 Hours, which Hours are an Appendix to the Year, but could not conveniently be added to it; therefore they were ordered to be reserved to the End of four Years, and being then added together they made a whole Day, which Day was to be inserted at the End of *February*, because that was not only the shortest, but the last Month of the Year; and this made 29 Days in that Month, and 'tis called an Intercalary Day.

For the better understanding this Matter, it is necessary to shew that *Romulus* divided the Year into 10 Months, but *Numa Pompilius* added Two more, which were *January* and *February*, and to the last he gave only 28 Days.

Now, because the 23d Day of *February* was Six Days before the Kalends (that is, the first Day) of *March*, reckoning that

* 2 Cro. 93.

Day inclusively, for every first Day of the Month was the first of the Kalends of that Month, therefore every fourth Year they reckoned the sixth Day of the Kalends of *March* twice over, or Two Days together, that is, on the 22d and 23d Days of *February*, one of which Days is exclusive, and the other inclusive of the sixth Day of the Kalends of *March*; and for that Reason the encreasing Day is called *Dies bis Sextus*, and the Year *Annus Bissextilis*, or Leap Year, because it was a Day longer than other Years.

We being once subject to the *Romans* received the *Julian Account* from them, and pursuant to their Method, we keep the Year within the Compass of 365 Days; and the Parliament *Anno 21 H. 3.* Enacted, *That the encreasing Day in the Leap-Year and the Day going before should be accounted for one Day*, and this is called Old Stile.

But because there wanted 11 Minutes in the Six odd Hours, according to the *Julian Account*, and the *Equinoxes* and *Solstices*, losing something every Year, were found *Anno 1582.* to have gone back 10 whole Days; therefore Pope *Gregory XIII.* by his own Power and Authority set aside this old Account, and by the Help of *Antoninus Lilius* reformed the Kalendar, cutting off 10 Days in the Month of *October* in that Year, so that he skipped from the fourth to the fifteenth Day of that Month; and because the Saints to whom those rejected Days were ascribed should have their due Observance (amongst which *St. Luke* was one) that Pope appointed that all of them should be commemorated on the Fifteenth of *October* in that Year; and this is called the *Gregorian Account*, or New Stile, and is observed in most Parts of *Europe*.

This Matter was a long while under Consideration, for when the Necessity of reforming the Kalendar was first found out, it was proposed to the Council of *Constance*, and the most learned Mathematicians and Astrologers of that Age were consulted in what Manner it might be effected; but they came to no Resolution, neither do I find that any of their Opinions were published how it might be done till near 100 Years afterwards, in the Reign of *Leo X.* and then several Expedients were proposed, one of which was to reject 10 Days in the Year, as aforesaid; but this was not effected at that Time, nor till above 60 Years after the Death of that Pope, viz. *Anno 1582.* in the Pontificate of *Gregory XIII.* as before-mentioned.

Nomination.

THIS is the Offering of a Clerk to him who hath the Right of Presentation; that he may present him to the Ordinary.

This Right of Nomination a Man may have by Deed; and in such Case, if the Patron should refuse to present to the Nomi-

nee, or should present another, he may bring a *Quare Impedit* against him, (b) it shall be *Quod permittat eum presentare*, and not *nominare*, &c. but the Conclusion of the Declaration shall be *Et ea ratione ad ipsum pertinet nominare* such a Person, who ought to present him to the Ordinary, and that the Defendant doth hinder him to nominate, and if he recovers, the Judgment must be *Quod Episcopus admittat Clericum ad Nominationem suam*.

The Nominator must appoint his Clerk within six Months after the Avoidance; for if he doth not, and the Patron presents his Clerk before the Bishop hath taken any Benefit of the Lapse, he is bound to admit that Clerk.

But where one hath the Nomination, and another the Presentation, if the Right of Presentation should afterwards come to the Queen, it hath been held, that he that hath the Nomination will be entitled to both, because the Queen, who is to Present, is only an Instrument to him who Nominates, and 'tis not becoming the Dignity of a Queen to be subservient to another; but I think rather with Justice *Doderidge*, that the Nominator should name one to the Lord *Chancellor*, who in the Name of the Queen should Present to the Ordinary.

And as the Presentation, so the Right of Nomination may be forfeited to the Queen; 'tis true, if the Patron, upon a corrupt Agreement unknown to the Nominator, presents his Clerk, this shall not be prejudicial to the Nominator within the Statute of *Simony*; but if the Nominator corruptly agreeth to nominate, his Right of Nomination shall be forfeited to the Queen.

Justice *Doderidge* found out a very nice Distinction relating to a Nomination of Clerk, which was thus:

Tenant in Tail of an Advowson by Fine grants the *Nomination* of a Clerk; this he tells us shall bind the Issue in Tail, by Virtue of the Statute 32 H. 8. cap. 36. but if he had granted the Nomination by Fine to a Man and his Heirs, and that when the Church was void the Grantee and his Heirs might Nominate, and that he, viz. The Tenant in Tail, and his Heirs, would present the *Nominee*; this Fine would not bind the Issue in Tail, because he had distinguished the Nomination from the Presentation, and so the Fine was not levied of the Thing entailed, but only of the Nomination.

Notice.

THERE are many Cases in the Law, relating to Ecclesiastical Affairs, which depend purely upon Notice, and therefore it may not be improper to inform the Reader in what Cases Notice is necessary, and where not.

(b) Moor 47.

And this chiefly relates to Avoidances by Act of Parliament, Cession, Death, Deprivation, Plurality, Resignation.

And lastly, in the Case of a Refusal of a Clerk by the Ordinary, and of Notice about setting out Tythes.

As to *Avoidances by Act of Parliament*, Notice ought not to be given to the Patron, because all Persons are virtually Parties to a Statute Law.

But there are some Acts by which 'tis expressly required that Notice shall be given; as by the Statute 13 *Eliz. cap. 12.* 'tis provided, that no Title to present by Lapse shall accrew upon any Deprivation *ipso facto*, till after Six Months Notice of such Deprivation, given to the Patron by the Ordinary.

The same Statute requires that none shall be admitted to a Benefice with Cure, unless he subscribe the 39 Articles in the *Presence of the Ordinary*; now, if the Presentee shall neglect or refuse so to do, the Bishop shall not take Advantage of Lapse, without giving * Notice to the Patron; and tho' he hath such Notice by any other Means than from the Ordinary, yet that is not sufficient to entitle him to a † Lapse, if the Patron should not present within the Six Months.

By the aforesaid Statute (c), if a Layman, or one not being a Deacon, and of the Age of 23 Years, is admitted to a Benefice with Cure, his *Admission is void*, and the Patron may present again without Notice.

But because the Statute makes only the *Admission void*, and leaves the *Presentation* as it was before, therefore in the Case of a Deacon the *Presentation* being in force, no Lapse shall incur, if he is deprived for Incapacity, without Notice given.

The like is required by the Statute 13, 14 *Car. 2. cap. 4. viz.* That no Title of Lapse shall incur, if a Man is *deprived* for not declaring his Assent and Consent to the Book of Common-Prayer, and subscribing the Declaration, &c. without Notice given of the Sentence of Deprivation.

Cession.] Where an Avoidance is by *Cession* the Patron is bound to take notice thereof at his Peril.

Death.] He is also bound to take the like Notice upon an Avoidance by Death, and in such Case the six Months are to be accounted from that Time in which he (d) might reasonably have Notice, and not immediately after the Death of the Incumbent.

Deposition.] In Cases of *Deposition*, Notice must be given to the Patron by the Ordinary before the Title by Lapse shall accrew, and this must be personal Notice, if the Patron lives in the same County; but if in another County, then Notice must be published in the Parish Church, and fixed on the Church-door; but this is *ultimum refugium*, as my Lord Dyer

* 1 And. 63. † 6 Rep. 29. Yelv. 7. (c) March 119. (d) 2 Rol. Abr. 363.

(e) calls it, for if it can be done in Person 'tis better ; and 'tis to be observed, that such Notice must express (f) the Cause of Deprivation.

As for instance, if the Parson is deprived for not reading the Articles of Religion, the Bishop ought to inform the Patron that his Clerk did not read them, &c. for which Neglect he is deprived, and thereupon it belonged to the Patron to Present, and so is the first Resolution in † *Green's Case*.

But in this Case, Notice or not seems chiefly to affect the Ordinary, for he shall have no Benefit of a Lapse, till Notice given to the Patron, and his Refusal for Six Months ; but the Church being actually void upon a Deprivation, the true Patron is at his Peril to take Notice of it in respect to a *Stranger*, tho' he is not bound to do it in respect to the Ordinary ; for if a *Stranger* (g) should Present, and his Clerk is admitted and instituted, and the Six Months pass, he hath got a Right by Usurpation.

Statute. p.] Where the Avoidance is by taking a second Benefice, 'tis necessary to know wherein the Canon Law differs from the Statute Law as to this Matter; viz. By the Canons of the Church, if a Clerk hath a Benefice under 8 l. *per Annum*, and he is instituted into another, of what Value soever, whether little or great, the first is void *de jure*, but not *de facto*, till Sentence of Deprivation ; (h) and because the Avoidance was by the Canon Law, therefore no Lapse can incur to the Ordinary till Notice given to the Patron.

But he may Present within the Six Months (i) and before any Sentence of Deprivation, or he may refuse till the Clerk is actually deprived and Notice given, &c.

By the Statute, if a Clerk hath a Benefice of 8 l. *per Annum*, or above, and takes another of any Value ; the first is *ipso facto* void, and the Patron is not to expect any Notice from the Ordinary, because the Avoidance, in Cases of Plurality, is now established by (k) Act of Parliament, and of such Avoidances the Patron must take Notice at his Peril.

Resignation.] In Cases of *Resignation* Notice must be given to the Patron, and that by the Ordinary, to whom the Benefice was resigned ; and if he should die before he gives Notice, the Guardians of the Spiritualities must do it ; and if they neglect, then it must be done by the succeeding Bishop, before any Title of Lapse shall accrew to him.

Now, in this Case, as well as in Cases of Deprivation, the Patron may take Notice if he will ; but if he suffer a Stranger to present, and his Clerk gets Admission, &c. and the Six Months

(e) Dyer 328. (f) Yelv. 7. 6 Rep. 29. † 6 Rep. 39.

(g) 2 Rol. Abr. 369. Hob. 318. (h) 2 Rol. Abr. 364, 365.

(i) Moor 542. Cro. Eliz. 601. 4 Rep. 75. Vaugh. 131.

(k) Jones 377, 404. Dyer 237.

pass, this Presentation and Incumbency make an Usurpation, because the Induction is a publick and notorious Act; (7) and therefore the true Patron ought to take Notice of it at his Peril, that he may provide a proper Remedy within Time, and not lose his Presentation, unless the Resignation was by Fraud and Contrivance to defeat the true Patron, for then Notice must be given of the Resignation.

If the Bishop refused to admit the Clerk presented to him, in such Case he must give Notice to the Patron, and shew for what Reason he refuse; (m) and this must be in some reasonable Time, a Month is too long.

Refusal of the Clerk.

But they distinguish between a Clerk of a Spiritual Person and of a Layman; (n) for in the first Case he is not bound to give Notice, because a Spiritual Person should have presented one qualified in all Respects fit for the Cure; but he is bound to give Notice to a Lay-Patron where he refuses his Clerk.

'Tis a common Opinion, that the Parishioners are bound to give the Parson Notice of setting out their Tythes; 'tis true, the Canon Law obliged them so to do, but 'tis otherwise by the Common Law, which prevails in this Case; for if the Parishioner sets out his Tythes (o) truly, he is not bound to give Notice, either to the Parson himself, or any other general Notice at the Church, of the Time when he shall set them out.

Setting out Tythes.

He cannot obstruct either the Parson or his Servants to be there, (p) who are bound to carry the Tythes away in convenient Time after they are set out; if they neglect, in such Case the Parishioner ought to give Notice that the Tythes are set out, otherwise he cannot have an Action for not carrying them away.

Obits, Oblations, Obventions.

AN *Obit* was an Office performed at Funerals, when the Corps was in the Church, and before it was buried; it afterwards came to be Anniversary, and then Money or Lands were given towards the Maintenance of the Priest, who should perform this Office every Year.

|| *Oblations* and *Obventions* are Two Words signifying the same Thing, and are usually accounted to be whatever is given, or offered by Religious Christians to God and the Church, whether in Lands or Goods; and 'tis not material whether such Things are given by Will, or otherwise.

'Tis probable that the Example of St. Paul might incite the Primitive Christians to offer these Gifts to the Church, for he

(l) 2 Rol. Abr. 369. (m) Cro. Eliz. 119. 1 Leon. 31. (n) 3 Leon. 46. Latch. 192, 253. (o) 1 Rol. Abr. 643. Stiles 342. (p) 3 Bulst. 336. Godb. 229. Noy 19. 2 Vent. 48. || 2 Inst. 489. E c 3 appointed

appointed every one of his *Corinthians* and *Galatians* to yield something to God for the Saints every Lord's Day ; but this being thought too often, therefore *Tertullian* tells us it was afterwards done every Month, and then *ad libitum* ; but it was always the Custom for Communicants to offer something at receiving the Sacrament, as well for holy Uses, as for Relief of the Poor, which Custom is, or ought to be observed at this Day.

In the first Ages of the Church those *Deposita Pietatis*, (q) which are mentioned by *Tertullian* in his *Apologetick*, were all voluntary *Oblations*, and they were received in lieu of Tythes ; for the Christians at that Time lived chiefly in Cities, and gave out of their common Stock, both to maintain the Church, and those who served at the Altar.

But when their Numbers encreased, and they were spread abroad in the Countries, then a more fixed Maintenance was necessary for the Clergy, but still Oblations were made by the People, which if in the Mother-Church then the Bishop had half, and the other was divided amongst the Clergy ; but if offered in a Parish-Church, then the Bishop had a Third Part, and no more.

These *Oblations*, which at first were voluntary, did afterwards by a continual Payment become due by Custom.

'Tis true, there are Canons which require every one who approaches the Altar to make some Oblation to it, as a Thing *convenient* to be done.

And 'tis probable that in Obedience to the Canons it became Customary for every Man who made a Will before the Reformation to devise something unto the high Altar of the Church where he lived, and something likewise to the Mother-Church, or Cathedral ; and those who were to be buried in the Church usually gave something towards its Reparations.

But at the great Festivals all People were obliged to offer something, not only as *convenient*, but as a *Duty* ; but the Proportion was left to the Discretion of the Giver, and I think with great Reason ; for the Bounty of the Christians in those Ages was so great, that Men would build Churches on their own Lands, on Purpose that they might have an equal Share of those Oblations with the Clergy.

And this might be the Occasion that the Emperors, *Constantine* and *Valentinian*, made Laws to Prohibit such excessive Gifts, which in those Days were kept in Store-houses built for that very Purpose.

But in succeeding Ages there was little occasion for such Laws, for the Zeal of the People was so considerably abated, that instead of those Repositories the Clergy had little Chests to contain those Gifts, till at last they dwindled into so small a Portion, that now they can scarce be felt in the Parson's Pocket.

(q) Still. 169. Tert. Apolo. cap. 39.

Besides,

Besides those Oblations made by the Living, it was then also usual to offer something at the death of Persons, which our *Saxon* Ancestors called the *Symbolum anime*, and we, from them, call it the *Saxon* Soul-Shot; and this was at first distinct from a Mortuary, though probably it might afterwards give a rise to that Duty.

There were many other occasional Oblations in those Days, upon particular Services, and at certain Times, as at Marriages, at Churching Women, Christning, Burials, and these were due by Custom; the Oblation of Fowls at *Christmas*, and the first Fruits of Corn payable on *St. Martin's-Day*.

The Offerings likewise at *Easter* are due by Custom, for they are not voluntary Oblations, but are paid as a Composition for Personal Tythes due at that Time, and not for Sacraments, as some have imagined; for if such Offerings are not Personal Tythes, then none are paid in *England*; for who pays any thing out of the Profits which arise by manual Occupations, or for Merchandize, besides these Customary Offerings at *Easter*?

These are confirmed by the Statute (a) to such Persons, and to be paid in such Places where the same hath been used to be paid for 40 Years before that Act was made, but Day-Labourers are excepted, so that those Customary Offerings, thus confirmed, are recoverable in the Spiritual Court; and Sir *Symon Degg* was of Opinion, that an Action may be formed on the Statute of *Ed. 6.* at Common Law, but I cannot well apprehend how an Action at Common Law may be formed on a Statute.

That Statute likewise enjoyns that the Payment shall be made in the Place where the Party dwells, at such Four Offering-Days as heretofore, that is, at *Christmas*, *Easter*, *Whitsuntide*, and on the Feast-Day of that Saint to whom the Parish-Church was dedicated, and if no such Dedication, then it was to be paid at *Easter*.

Thus the Profits of the Churches in *London*, and in other great Cities, were originally Oblations and Obventions, which for many Ages have been called Tythes; they could not be Prædial unless the Houses grew out of the Ground, and they could not be mix'd Tythes, for though something might arise by the Industry of Men, yet it was not out of the Earth, so that it must be a Personal Tythe or nothing, and therefore those Customary Offerings at Marriages, Churching of Women, &c. which were paid before the Statute, ought to be paid now, and are recoverable in the Spiritual Court.

This is likewise enjoyn'd by the Statute 32 *H. 8. cap. 7.* which requires all Persons duely to set forth, and pay all Tythes and Offerings according to the Custom of the Places where they grow due; and that the Party neglecting, may be cited before an Ecclesiastical Judge, who hath Power to determine the Mar-

(a) 2 *Edw. 6. cap. 13.*

ter according to the Ecclesiastical Laws; and if he Appeal, the Judge may award Costs, and compel the Appellant to pay the same by Ecclesiastical Censures, taking Surety of the Appeal to restore the Costs in Case the Appeal shall be adjudged against him; and if after Sentence given, the Party still refuses to pay this Duty, then, upon Certificate from the Judge, Two Justices of Peace *Quorum unus* may commit him to Goal, there to remain till he enter into a Recognizance with Sureties to perform the Sentence; but this Statute doth not extend to the City of London, or the Suburbs thereof, 'tis confirmed by 2 & 3 Ed. 6. cap. 13.

The word *Offering* in this Statute extends to all Customary Payments for Christnings, Churchings, Burials, and Marriages; but not to other Church Duties, as Corrodies, Mortuaries, &c. and 'tis to be observed, that wherever Costs are awarded by Virtue of the Statute 32 H. 8. the Cause must properly belong to the Jurisdiction of the Spiritual Court, otherwise a Prohibition will be granted as well to the principal Cause, as to the Costs.

Ordination.

THE Apostles appointed Bishops, Priests and Deacons to be the standing Guides and Governors of the Church; and because there should be a Succession of them continued in all Ages, for the Peace and Preservation of those Churches which they had planted, therefore 'tis necessary that there should be a Power lodged some where, to set a-part some distinct Orders of Men to those publick Offices, and this is called Ordination.

All hold it necessary that there should be such a Power, but they dispute where it is.

Those who dissent from Episcopacy affirm, that a Man ought not to take upon him the Ministry without a lawful Call, which is very true. They likewise agree, that Ordination ought to be continued, and they define it to be a solemn setting a-part some Person to a Church Office; but they say 'tis not only to be done by Imposition of Hands and Prayer, but with Fasting by *Preaching-Presbyters*, and that those, who are not set a-part themselves for the Work of the Ministry, have no Power to joyn in setting a-part others for that purpose; and this Form of Ordination was proposed to the Parliament, in the Year 1643. by an Assembly of those Persons, in order to be ratified

There are another sort of People who dissent from Episcopacy, and they hold, that where there are no such *Preaching-Presbyters*, in such Case other Persons, sufficiently qualified and approved for their Gifts and Graces by other Ministers, being chosen by the People, and set a-part for the Ministry, by Prayer and Fasting in the Congregation, may exercise that Office;

so

So that some place the Power of Ordination in simple Presbyters, and others in the People.

Archbishop Bancroft, who never favoured Prebytery, seemed to allow this way of Ordination ; for when Prelacy was erected in *Scotland*, and some of their *Presbyters* being elected Bishops, and to be consecrated here, *Bishop Andrews* proposed, that they ought first to be ordained *Presbyters*, not having yet been Episcopally ordained ; but that *Archbishop* was of Opinion, that there was no necessity of their Reordination, for, where a Bishop cannot be had, an Ordination even by *Presbyters* was lawful.

There are some who have advanced very strange Notions of Ordination, telling the World that 'tis not to be justified by the Scripture ; and the Word it self signifies a lifting up of Hands, and is used in Scripture for giving a Vote, which in all popular Assemblies is Customary even at this Day ; from whence they infer, that the Christian Churches were at first Democratical, that is, the whole Congregation chose their Pastor ; and that by Virtue of such Choice he did not pretend to any peculiar Jurisdiction distinct from others, but he was only approved by the Congregation for his Parts, and appointed to instruct the People, to visit the Sick, and to perform all other Offices of a Minister ; and at other Times he followed his Trade, and that the Christians in those Days had no notion how a Pastor could pretend to any Succession to qualify him for the Ministry, for that the Pretence of dispensing Divine Things, by a meer Human Constitution, was such an Absurdity, that it could not be reconciled to Reason.

This and many more such Calumnies were cast on Ordination, and the Bishops themselves were called Ordination-Mongers ; but it was by those who alledged that the Purity of the Christian Religion, and the good and orderly Government of the World had been much better provided for without any Clergy.

But I shall shew from Scripture, from Antiquity, and from the concurrent Testimony of the Fathers, that Bishops had, and ought to have the Power of Ordination.

When our Saviour established the Christian Church, he made his Apostles Governors thereof, and vested them with a Power to ordain others to the Ministry, and accordingly they ordain'd the Seven Deacons, and consecrated *St. James Bishop of Jerusalem*, and he ordained Presbyters of that Church.

That *Timothy*, as soon as he was made a Bishop of *Ephesus*, by the great Apostle of the Gentiles, but not before, had this Power of Ordination, this is allowed by *St. Chrysostom* himself, who magnified the Power of Presbyters more than any of the Fathers ; and he proves it thus, viz. because *St. Paul* gave *Timothy* a Caution not to admit any one rashly to an Ecclesiastical Office.

'Tis

'Tis true, he likewise bid him not to despise the Gift which was given to him by Prophecy, with laying on Hands of the Company of Eldership; but he could not mean by those Words an assembly of ordinary Presbyters, for as such they could not have conferred any extraordinary Commission, especially upon *Timothy*, because he was at that very Time a Bishop, and ordained by *St. Paul* himself.

He had a Jurisdiction over all the Presbyters of *Asia*, for he had Power given him by that Apostle to enquire into their Conversation and Abilities, and then to admit them into that Holy Office, if he found them qualified, and not otherwise.

Titus had the same Power throughout that populous Island of *Crete*, and these Things are so plain, that they must deny the Authority of the Scriptures, who deny the Power of Ordination to be originally in Bishops, and therefore they have invented a senseless Objection, viz. that though *Timothy* and *Titus* were superior to Presbyters, yet their Power was but Temporary, for they were chosen by the Apostles at that Time upon a particular Occasion to preside in the Assemblies of Presbyters, to moderate the Affairs of those Churches, which Power was to determine at the Expiration of their Commission.

But this cannot be proved by History, or any Records; 'tis a meer imaginary Whimsy, contrived to make a Parity between those Two distinct Orders of Men, and it can have no Foundation in Scripture, from the promiscuous Use of the Words Bishop and Presbyter; for tho' 'tis true, that the last is used to shew the Humility of a Bishop, yet 'tis as true that the word *Apostle* is likewise used to shew his Superiority.

So that in the primitive Times Bishops, ordained as Bishops and not as Presbyters, and the very Act of Ordination was not then a Power of Order, but it was an Act of Jurisdiction. This Distinction hath since been found out by the Schoolmen, for in those Days, as it hath been already observed, Bishops and Presbyters were accounted distinct in Order, whatever hath of late Years been advanced to the contrary.

Therefore the Objection, that a Bishop and Presbyter were neither distinct in Order or Office, that tho' the Apostles and those who immediately succeeded them, exercised a large Jurisdiction, yet it was granted to them by our Saviour, as they were Apostles, and did in no wise concern their Successors, to whom he gave no such Authority, nor any manner of Superiority over their Fellow-Presbyters. These, and such like, are Doctrines which neither agree with the Scripture, nor with the Fathers, they are contrary to the plain and constant usage in the Church for 1600 Years, during all which Time most Christian Churches have been governed by Bishops; and tho' some of the reformed had not that form of Government amongst them, yet *Calvin* and *Beza*, who were the most learned amongst them,

them, have approved and commended it; and not only so, but lamented that they were not permitted to retain it.

But to shew that a Bishop and Presbyter were not accounted by the Fathers to be the same Thing, I shall instance the Opinions of *Clemens Romanus*, and *Hermes*, who lived and wrote in the First Century, and both of them affirmed they were distinct in Order, and so did *St. Ignatius*, and others in the Second Century, so that we have at least as equal Authority to believe that this Power of Ordination was originally in Bishops, as we have to believe such Parts of the Scripture to be Canonical, because those Books which were Apocryphal were not divided from the other till the Second Century, and therefore those, which are admitted to be Canonical by the Church, must depend upon the Credit of those Fathers who lived in that very Century.

If we look into the Ecclesiastical Histories, we shall find that this Power was in the Bishops, in the first Four Centuries; 'tis evident from the Apostolical Canons in the Second Century, and by several other Canons made in General Councils; and though the Presbyters of the *Western Church* were allowed to lay on their Hands at Ordinations, at the same Time with the Bishop, yet that was not of Necessity, but only for the greater Solemnity of the Act, and this is allowed by *Salmasius* himself, (a) who cannot be thought Partial in favour of Episcopacy.

But there are some who will have it, that *St. Jerom* in his Epistle to *Evagrius* affirms, (b) that the Presbyters of *Alexandria* ordained their own Bishop from the Time of *St. Mark* to the Time of *Heracles* and *Dionysius*, who were Bishops and Presbyters there, and this is produced as a common Allegation against the Right of Bishops to Ordain, &c.

But it will appear otherwise upon reading the Words, for he tells us, that they chose one out of their Number, and placed him in higher Degree than the rest, whom they called a Bishop, just as an Army chooses a General, &c. so that he speaks of the Election, and not of the Ordination; for the placing a Person on the Bishop's Throne was in those Days a Sign that he was the Man elected, but the Ordination was performed by other Bishops.

'Tis true, some Presbyters did undertake to Ordain without the Bishops, but those Ordinations were always condemned as invalid, and to be meer Usurpations upon the Power of Bishops: Many Instances of this Nature may be found in *Baluzius* too tedious to repeat, and even *Novatius* himself, who was a Presbyter at *Rome*, and a great Disturber of that Church, would not venture on such an Ordination, when he opposed *Cornelius*, and attempted to be made Bishop of *Rome*, but sent for Three Bishops out of remote Parts of *Italy* to Ordain him.

(a) Salm. 289. (b) Epist. 85.

After all, we are told by a late wrong Asserter of the Rights of the Church, (c) that Archbishop *Cranmer*, at a Consult of the most eminent Divines of his Time, gave it under his Hand, that the Ceremonies and Solemnities used in admitting Bishops and Priests to their respective Offices were not of Necessity, but only to preserve Order; and that God never promised more Grace in committing the Ecclesiastical, than the Civil Offices; for the Scripture doth not require that a Bishop should be Consecrated, since the very Election or Appointment is sufficient.

But with his leave, 'tis very doubtful whether that Archbishop was ever of that Opinion, but if he was, he came to be better advised, for he changed it; and this appears from his Sermon concerning the Authority of Kings, which is in his Book, entituled, *Catechismus*; and there he observed that St. *Paul* positively declared it to be necessary to Salvation to have Preachers and Ministers of the Word; that such Preachers must not assume that Honour before they were called, but must be ordained to that Holy Office, and sent to us by God; and that except they are so sent, they cannot Teach with effect.

I know it has been objected against my Lord of *Sarum*, that in his learned Exposition of the Articles he seems to favour that supposed Opinion of that Archbishop, by telling us, that if a Company of Christians find the publick Worship defiled where they live, and do not know where they may conveniently worship God in a regular Way; in such Case, if they submit to those who are ordained to the lower Functions, or by a common Consent set up one of their own Number to be their Minister, and shoud from such a beginning grow up to a regulated Constitution, though they are quite out of all Rule, yet if the Necessity is real, even our Church did for above half an Age, after the penning those Articles, acknowledge a Foreign Church thus constituted to be a true Church as to the Essentials, notwithstanding it was irregularly formed, and continued still to be in an imperfect State.

From which Paragraph 'tis inferred, that if a Minister should be thus set up without Ordination by a Bishop, this would be to lodge an original Power in the People, in favour of those who dissent from Episcopacy.

I shall not enquire how far this may be allowed in Cases of absolute Necessity, tho' the Rule is, *Inculpabile judicandum est quicquid necessitas intulerit*, and some learned Men are of Opinion, that 'tis better to have an irregular Clergy, than none to officiate in those Churches which are reform'd from the Church of Rome; especially being compelled to Irregularities meerly by Necessity, and by the constant and willful Refusal of the Roman Bishops to Ordain those who have reform'd from them: And this seems to be the Opinion of Bishop *Mymer*, at the beginning of the Reformation, who ordained his Porter to pray and administer the Sacraments in

(c) Rights of the Christian Church, fo. 178.

the Church at *Pading*, and justified it by reason of the meanness of the stipend, where no Preacher could be had.

But *Tertullian* in his Book *De exhortatione castitatis* went a little farther, for he tells us, *ubi Ecclesiastici ordinis non est confessus sacerdos es tibi solus*, and 'tis the Opinion of the learned *Kingdus*, who published the Works of that Father, that by this Sentence, he meant Laicks might consecrate, being in Places where they could have no Priests; and *Grotius* was of the same Opinion, which may be seen in his Dissertation, *de cane Administratione ubi pastores non sunt*; *Erasmus* likewise, in one of his Letters to Bishop *Tunstall*, affirms, that in the Primitive Times the Faithful communicated together, there being often no Priest in their Company.

But 'tis very improbable, that Bishops should be wanting to ordain Priests, because they being set over the Church by the Appointment of God himself, he will never suffer them to turn all Hereticks at once, but some will still remain Orthodox, to whom those Persons who are qualified, may resort, to have their Episcopal Power communicated to them.

And as for the Quibble that which is out of all Rule can never grow up to a regulated Constitution, it seems to me to be a very poor Witticism; for every one knows that the Pagans, who adore false Gods, have Rules and Orders in their solemn Acts of Worship, and so from a wrong Foundation have grown up to a regulated Constitution, though they are out of the true Rule by which the Church of God is governed.

Having said thus much as to the Necessity of Ordination, and in whom the Power to Ordain is lodged, I shall proceed to shew what is required by the Law of those who are to be Ordained.

And first I shall take Notice of the (c) Canon, which requires that no Man shall be Ordained without a Title, and because some Persons may not apprehend what is meant in this place by the word Title, I shall explain what it is.

What is required of those who are to be ordained.

A Title, as it relates to the Clergy, was originally no more than entering their Names in the Bishop's Roll, and then they had Authority to assist in the Ministerial Functions amongst the Preachers of that Diocese, and they had a Right to have a share out of the Common Stock, or Treasury of the Church.

But since Churches were built, and Dioceses divided into Parishes, a Title is now an Assurance of being employ'd to officiate in some place of Divine Worship; for by the Canon (d) no Man is to be ordained unless he is to be a Curate or Incumbent, or to have a Minister's Place in some Church, or unless he is Fellow of some College in our Universities, or Master of Arts of Five

Years standing, and liveth there at his own Costs; and that the Bishop who Ordains a Clerk without a Title, shall keep him till preferred to some Benefice.

In Conformity to this Canon, Archbishop Laud sent Letters to all his Provincial Bishops, requiring them not to admit any Person into Orders, but those who had a Title for their Maintenance, in which Letters he declared what should be a Title.

A Presentation to some Ecclesiastical Preferment, a Certificate that he is provided of some void Church; a Grant of some Petty Canons Place, or the like, in a College or Cathedral Church, a Fellow of some College of our Universities, or a Chaplain there; a Master of Arts of Five Years standing, &c. or if the Bishop who Ordains the Clerk intends shortly afterwards to admit him to some Benefice or Curacy then void.

Mr. Prynne, who found fault with every thing either said or done by that Archbishop, (e) tells us, that this seemed very fair *prima facie*, but that there was *anguis in herba*, because neither a Lecturer or Chaplain to a Nobleman was allowed by the Archbishop to be a Canonical Title, and that by this means young Divines would be made more dependant on Bishops than on the Lords or Commons; which is a false Suggestion, for their Right of Presentation was not impeached by those Circular Letters, or any thing therein contained.

There is another Canon (f) which prohibits Bishops to admit any Person to Orders, who is not of his own Diocese, unless he is of one of our Universities, or bring Dimissory Letters from the Bishop in whose Diocese he resides.

And by the Statute 15 Eliz. cap. 12. he who is to be ordained Priest must bring a Testimonial from Four Persons (known to the Bishop to be of sound Religion) of his Life and Doctrine, that is, as to his Manners, for the chief Things to be enquired into are, whether the Person be *commendandus scientia & moribus*, and the Bishop himself is the proper Judge as to his Learning, but he must be directed as to his Manners, by the Testimonial of other Persons.

I shall now proceed to shew the ancient Form of Ordaining Priests and Bishops, but it will be a very difficult Undertaking to give a true Account of the Form of Ordinations in the Primitive Churches, because many of the Registers of those Churches were destroy'd by the persecuting Heathens.

However, I shall give a fair Account of those Forms in the Latin Church, which I find in Morinus, who has published the most ancient Rituals of that Church, by which it will appear how free Ordinations were from Superstition at that Time, which is about the beginning of the Sixth Century, and what insignificant Ceremonies and Rites have been superadded to them since that Time.

(e) Canterb. Doom. 384. (f) Can. 34.

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Those Rituals tells us, That the Form then used was for the Bishop to bless the Priest to be ordained, laying his Hand on the Priest's Head, and that all the Presbyters present were to hold their Hands on his Head, near the Hand of the Bishop, and at the same Time.

The Ordination of a Priest.

'Tis probable, that all Ordinations in the Christian Church were made by Imposition of Hands and Prayer, from the first Precedent of making a Deacon, which was done by the Apostles themselves in that manner; but long before that Time, Imposition of Hands was a Solemnity used amongst the Jews, to denote the Person who was designed for an Office of Dignity, or any Place of Trust.

Then they pray'd for him that God would multiply his Heavenly Gifts, and pour forth the Holy Ghost upon him.

Then followed the Consecration Prayer, viz. That God, who set up the High Priests to Rule the People, did afterwards choose Priests of an inferior Order to assist them, that he infused into the Sons of Aaron some of that fulness which was in their Father, that their Ministry might be sufficient both for the Sacrifices and Sacraments, that the same God did likewise add Assistants to the Apostles who taught the true Faith, therefore they beseeched him to grant to the Person then to be ordained the Dignity of the Priesthood, &c.

Then they all joined in one Prayer of Consummation, that the Person thus consecrated might obtain the Blessing of the Priesthood, and the Gifts of the Holy Ghost, &c.

And in the last Place there was a Prayer of Benediction, viz. that God would Bless his Servant who was thus dedicated to the Honour of the Priesthood, that by his Life and Conversation he might prove himself to be instructed in those Doctrines which St. Paul delivered to Timothy, and that he might meditate on the Law of God both in the Day and Night, and believe what he read, and teach what he believed, &c.

I do not find that any particular Words were used by the Bishop when he laid his Hand on the Priest's Head, till some Ages afterwards, and then these Words were pronounced, viz. *Take thou Power to read the Gospel in the Church of God, as well for the Living, as the Dead. In the Name of the Father, &c.* But Morinus has discovered the Interpolation of these Words, in an old Margia of the Ritual 600 Years since, both in fresher Writing and Ink; and this was since the Doctrine of Purgatory was invented; afterwards these Words were used, viz. *Receive the Holy Ghost, whose Sins you remit are remitted to them, and whose Sins you retain they are retained.*

In latter Rituals the giving the Vestment was added, and the anointing the Hands of the Priest, and a particular Form of Blessing them, and then the anointing his Head.

Afterwards there was another Ceremony added in putting on the Vestment, which was usually done by the Bishop, saying these Words, *viz. Take the Yoke of God for 'tis Sweet, and his Burden is Light.*

Then the Casula was put on, and these Words were added, *viz. Let the Lord Cloath thee with the Robe of Innocence*; then the Patin was delivered with the Host, and the Cup with the Wine, and these Words were pronounced, *viz. Do thou take Power to offer Sacrifices, and to celebrate the Mass as well for the Living, as the Dead.*

And lastly, the Bishop made a Cross on the Priest with Oyl and Chrism, and kissed him, and this was the manner of Ordaining Priests.

Ordination of a Bishop. I am now to shew the ancient Form of Ordaining a Bishop: This was an Office not limited to any constant Method, but received Alterations in several Ages.

At first the People were admonished how necessary it was for one Bishop to succeed another, and being certified that the Clergy had chose a Successor, they were desired to approve such Choice.

Then followed some Collects to this effect, *viz. That God would give Grace to this his Servant, whom he had appointed by the Suffrages of the People to be raised from the Seat of the Elders to be placed with their Princes; that he being now a Governor might not be lifted up, but as he was greater, so he might be more humble, &c.*

Then there was a Prayer of Consecration, that God would give Grace to his Servant chosen to the Ministry of the High Priesthood; that whatever his Garments formerly signified in the Curiosity of the Workmanship might appear very bright in the Manners and Behaviour of the Bishop Elect, that God would give him an Episcopal Chair to govern the Church, and that he would be unto him both Authority and Power, and multiply his Blessings and Grace on him, that he might be fitted by his Gifts to implore his Mercy, &c.

Then followed some Collects and Prayers for the new Bishop.

In another Ritual some Questions were asked of the Bishop, *viz. whether he is Temperate, Humble, Affable, and learned in the Scriptures and Ecclesiastical Doctrines, &c.* and after this Examination, Two Bishops were to lay the Gospels on his Head, and one pronouncing the Blessing, all the Bishops present were likewise to lay their Hands on his Head.

Then the Patin with the Host, and the Cup with the Wine were given to him in these Words, *viz. Receive Power to offer Sacrifice,* and his Hand and Head were anointed with Holy Oyl.

Afterwards Two new Rites were added, viz. The giving Investiture by a *Ring and Staff*; the Ring was given with these Words, viz. That he would be mindful of the Ecclesiastical Wedding, and the Love of God, in that Day he obtained the Honour to be a Bishop, receive therefore the Ring and Seal of Discretion, &c.

In giving the *Staff* these Words were used, viz. Receive the *Staff*, the Sign of the Sacred Government, that you may strengthen the Weak, confirm the Doubtful, and correct the Wicked; and afterwards it was blessed in these Words,

*Tu Baculus nostræ & Rector per secula Vita,
Istum sanctifica Pietatis jure Bacillum,
Quo mala sternantur; quo semper recta regantur.*

Then there was another new Rite added, which may be found in the *Roman Pontifical*, and that was the giving the Gospel in these Words, &c. Receive this Gospel, and go and teach all Nations.

Then another Rite was added of putting the *Chrisme* upon the *Thumb*, and a *Mitre* on his *Head*, till at last it was made a Sacrament.

From all which it appears that the ancient Form of Ordaining Presbyters was by *Imposition of Hands*, which was only a Designation of the Person, and by a Consecration-Prayer, of which there was no set Form, for every Bishop had Liberty to use what Prayer he thought fit, so as it contained the Substance of the Benediction.

'Tis true, the Words *Receive thou the Holy Ghost*, &c. are in none of these ancient Rituals, however, they are in the *Roman Pontifical*; but if other Churches did alter or superad to those ancient Forms, the Church of *England* hath equal Power to make her own Ritual in Point of Ordination.

Therefore our Reformers rejected all those insignificant Forms of blessing the Hands of the Priest, and anointing them and his Head, the giving the consecrated Garments, and the Paten and Cup, and many other Ceremonies; and in the Beginning of the Reformation, this amongst the rest of the Divine Offices was thought fit to be reformed; and for that Purpose Anno 3 Ed. 6. a Bill passed both Houses of Parliament, purporting that such Forms and no other should be used, which should be set forth by Six Bishops and Six other Divines, to be commissioned by that King, under his Broad Seal, and accordingly in the next Year he appointed 12 Commissioners, of whom *Heath*, then Bishop of *Worcester*, was one who always opposed the Reformation in Parliament, and they all, (except that Bishop) agreed to a Form as now used by *Imposition of Hands and Prayer*, and he refusing was committed to the Fleet.

The Form now used for Ordaining a Priest is thus,

**The Form now
used for Ordain-
ing a Priest.**

After *Veni Creator* is sung, and some Prayers, the Bishop with the Priests then present laying their Hands severally on the Priest's Head, the Bishop pronounces these Words:

Receive the Holy Ghost for the Office and Work of a Priest in the Church of God, now committed to thee by the Imposition of our Hands; whose Sins thou dost forgive are forgiven, and whose Sins thou dost retain are retained, and be thou a faithful Dispenser of the Word of God, and of his Holy Sacraments, in the Name of the Father, &c.

Then the Bishop delivers a Bible to him with these Words, *viz.* *Take thou Authority to preach the Word of God, and to minister the Sacraments in the Congregation where thou shalt be lawfully appointed.*

The learned Bishop of Sarum (a) tells us, that some Additions were afterwards made to this Form, and this was by asking the Priest several Questions; the first is,

1. Whether he thinks himself truly called according to the Will of God? &c.
2. Whether he believes that the Holy Scriptures contain all Doctrines sufficient for Salvation?
3. Whether he will instruct the People out of those Scriptures?
4. Whether he will be faithful to administer those Doctrines and Sacraments?
5. Whether he will banish all false Doctrines?
6. Whether he will be diligent in Prayers and reading the Scriptures, and in his Studies, laying aside the Study of this World?
7. Whether he will be diligent to order himself and Family according to the Doctrine of Christ?
8. Whether he will maintain and promote Quietness and Peace, and Love amongst Christian People?
9. Whether he will obey his Ordinary?

To all which Questions the Priest answers in the Affirmative; but if they were seriously considered before such Answers were made, especially the first Question, whether he thinks himself truly called according to the Will of God? That is, inwardly moved by the Holy Ghost to take upon him the Ministry, it might prove not only happy to the Person himself, but to those who shall be afterwards under his Care.

But when the Answer is suddenly pronounced, without any previous Consideration of such important Questions; when a Priest enters into Orders only to entitle himself to a Benefice, without any inward Call from the *Holy Ghost*; if this is the Case, (as I am afraid it too frequently happens) then he speaks false in the Presence of God, even upon the most solemn Occa-

(a) Hist. Reform. 2 Part. 145.

tion, and this must be a sham Dedication of himself to his Service; and 'tis very improbable that the God of Truth should give any Blessing to the Services or Ministry of such a Person, who leap'd into the Church by a wilful and premeditated Lie.

Let such Men consider the severe Punishment of *Korah* and his Party to be buried alive, which will always remain as a dreadful Example to those who thrust themselves into the Ministry, without a Call from God; it was he alone that made *Aaron's Rod* to blossom, and who chose those to be his Ministers whom he qualifies with Vertues suitable to so sacred an Employment; now he, who rashly engages himself in this holy Office, without an inward Call from the Holy Ghost, kindles his *Censer* at strange Fire, and instead of being a Minister is a Rebel to his God.

I shall proceed to shew the Form now used for Ordaining a Bishop.

One Bishop must read the Communion Service, and then Two other Bishops are to read several Prayers, &c. and afterwards must present the Bishop Elect to the Archbishop, or to some other Bishop lawfully commissioned.

The Form now used for Ordaining a Bishop.

Then the Mandate for his Consecration being produced, and the Oath of Supremacy taken, and that of Obedience to the Archbishop; and after some Prayers and Questions asked after the same manner as before in the Ordination of Priests, the Archbishop and Bishops present must lay their Hands on the Head of the Bishop elect, the Archbishop pronouncing these Words, *viz. Receive the Holy Ghost for the Office and Work of a Bishop in the Church of God, now committed to thee by the Imposition of our Hands, in the Name of the Father, &c. and remember that thou stir up the Grace of God, which is given thee by the Imposition of our Hands; for God hath not given us the Spirit of Fear, but of Power, and Love, and Soberness.*

Then the Archbishop is to deliver a Bible to him, saying, *Give heed unto Reading, Exhortation and Doctrine, and think upon the Things contained in this Book, and so concludes with Prayers.*

But to return, we may see by the Form and Ordination of a Priest what is now become his Duty; and when he hath thus solemnly promised to perform it, I cannot see how he can relinquish it to the Care of a Curate.

That learned Prelate before-mentioned tells us, that the Negligence and Faults of some of the Clergy have brought that Scandal on the Church, which could otherwise never sink in its Reputation; for the People, seeing such plain and gross Faults in the Behaviour of some Ministers, are first prejudiced against their Persons, and then against the whole Church, upon their Account; so that such Men are not only answerable for the Souls committed to their Charge, but for those Divisions which are amongst us, which were chiefly occasioned by their Negligence and Indiscretion.

I shall conclude this Title with the Statute 13 *Eliz.* before-mentioned, which tells us what Qualifications are required in the Person to be Ordained, *viz.* *That he must be learned in the Latin Tongue, and sufficiently instructed in the Scripture, he must not be made a Priest, unless he is able to give the Bishop an account of his Faith in Latin, according to the Articles of Religion, or have a special Gift or Ability to be a Preacher.*

And here I cannot but take Notice of that Minister who subscribed the 39 Articles thus, *viz.* *Ego subscribo ad tricena novena Articulorum Fidei*; I believe this Man was neither moved by the Holy Ghost to take upon him the Ministry, nor able to give an Account of his Faith in *Latin*.

'Tis probable that there was some Promise, Agreement or Bond, * or other Assurance made to procure an *Ordination* for him at first; and if so, the Person procuring it forfeits 40 *l.* and the Clergyman so Ordained 10 *l.* to be divided between the Queen and Prosecutor, and shall lose any Ecclesiastical Living which he shall accept or take within Seven Years after such corrupt entring into the Ministry, and the Patron may present, as if the Clerk was actually dead.

Organs. See Church.

Pardon.

MOST Causes of *Deprivation* may be remitted by a *Pardon*, unless where an Act of Parliament interposes and makes a Living void; as for Instance, upon an Avoidance for not reading the 39 Articles, a *Pardon* cannot restore the Party, because by the Act the Punishment (*a*) is the Loss of the Living, and 'tis not a Contempt for which he might be indicted.

So where a Man is presented by *Simony*, a general *Pardon* will not settle him in the Living, because the Church was never full of him by reason of the *Simony*.

'Tis true, a *Pardon* will excuse him from the Forfeiture of the double Value of the Benefice, and for that Reason it can never be recovered by an Informer; but the Church always remains void wherever the Presentation is by *Simony*.

My Lord *Hobart* (*b*) was of Opinion, that tho' there is a Special Pardon of the very Act of *Simony*, yet the Church still remains void, because the Pardon cannot enable a Clerk to hold a Benefice, whom an Act of Parliament hath disabled, if it did, it would be a Dispensation with the Act it self; therefore, if *Simony* cannot be pardoned where 'tis expressed in a special Pardon, *a fortiori* it cannot be pardoned by any general Words (*c*) in a Statute enumerating several Offences by

* 31 *Eliz.* cap. (*a*) *Cro. Eliz.* 680. (*b*) *Hob.* 167. (*c*) *Sid.* 170.

Name, and then pardoning them, *and all the Offences which the Queen can pardon*; tho' there is a sudden Opinion to the contrary in one of our Books, (d) where 'tis held that the Word *Offences* includes all Crimes which are not capital.

If a Man is deprived for *Incontinency*, during the Sessions of Parliament, and that Offence is afterwards pardoned by the Parliament, the Deprivation is void, and the Clerk shall be restored to the Benefice, for the Pardon relates to the first Day of the Sessions.

So where one * *Burton* committed *Adultery*, Anno 1 *Eliz.* for which he was deprived in the very next Year, then came a general Pardon, dated 2d *April* 13 *Eliz.* by which the Crime of *Adultery*, committed before the 14th Day of *February* then last past, was pardoned; it was adjudged that the Clerk should be restored, for the Cause being pardoned, which was the Foundation of the Sentence of Deprivation, that is also discharged, and the Pardon shall relate to the Fact.

But (e) this hath since been denied to be Law, and particularly by Justice *Windbam*, who was a very learned Judge; and it seems to be very reasonable, that the Sentence given before the Pardon, should not be made void by any relation, but only voidable till reversed by another Sentence; and 'tis a forced Construction of a Pardon to make it relate and look back to discharge Offences committed many Years past, and for which Sentences of *Deprivation* had been solemnly given in proper Courts: And it would be very inconvenient to restore Criminals to Livings, where other Persons had been legally inducted upon such Deprivations, and had enjoyed the same, without any Interruption, for a considerable Time.

Thus much for *Pardons*, as they relate to *Deprivations*; there are some other Cases where a general Pardon doth not help the Party, (f) as if he is sued for *Slander* in the Spiritual Court, because the Libel is *ad instantiam partis*, but 'tis otherwise where the Suit is *ex Officio*.

But where *Costs* were taxed in the Spiritual Court Nine Months after the Sentence given, and then came a general Pardon, which related to a Time before the taxing the *Costs*, that was held a sufficient Discharge.

Parishes.

IN the first Ages of Christianity there were no fixed or determinate Boundaries for the Apostles and their immediate Successors to exercise their Sacred Function; their Mission

(d) 1 Mod. 102. * 6 Rep. 13. b. Latch. 22. My Lord Coke refers us to this *Burton's Case* in *Dyer*; but there is no such Case in that Book, or any where else, as he hath reported it. (e) Sid. 164. (f) Cro. Eliz. 684.

was to teach *all Nations*, Baptizing them in the Name of the Father, &c.

But when St. Peter had Ordained Priests, and *Cletus* had reduced them to a certain Number; *Evaristus*, who was also Bishop of *Rome* about the Beginning of the second Century, assigned to each Priest his *Title*, that is, his *Parish*, which was the Place where the Converts usually assembled to Worship.

Afterwards, within the Space of 40 Years, the new Converts encreased so fast, that *Hyginus*, who was likewise Bishop of *Rome*, placed a Priest in every Parish or Place where these Assemblies were, and the Chief of those Priests he called *Cardinal Presbyters*, which some think was the Beginning of those who are now called *Cardinals* in the Church of *Rome*.

But this was above 100 Years before any Limits were set to those Parishes, for that was done by Pope *Dionysius* at *Rome*, who allotted Churches to particular Presbyters, and was the first who divided the Western Diocese into Parishes, in which the respective Priests were to have a certain and determinate Right to exercise their Functions, and to receive the Profits due to the Church, arising within those Limits.

The Churches wherein these Presbyters preached to the People were built in the most convenient Places for propagating Christianity, but chiefly in Cities and great Towns; and therefore the Distribution of them to the Presbyters related, at first, to the City of *Rome*, which was done before by his Predecessor *Evaristus*; but those Churches, being taken from the Christians, during their Persecution by *Valerian*, were restored by the Authority of this *Dionysius*.

But the dividing Diocesses into Parishes related almost wholly to the Country, which happened thus:

The *Romans* had in every City a Civil Magistrate, who was called *Defensor Civitatis*, whose Office was to execute Justice both in the City and Suburbs, and within other Villages contiguous to the City, and within its Jurisdiction; and as they had such a Civil Office, so likewise there was a Bishop in every City, who was Superintendent over the Affairs of the Church, not only within the Walls of the City, but in the adjoining Villages.

But the Number of Christians encreasing, it was too great a Work for the City Presbyters to exercise their Function both in the Cities and Villages; and therefore this Pope, and other Primates following his Example, settled distinct Presbyters in those and other Villages and Towns within their Diocesses, and limited the Boundaries thereof, which were called Parishes.

'Tis true, the Word *Parochia* was by the ancient Writers used in a larger and more comprehensive Sense; for the Churches of *Alexandria*, *Carthage*, *Corinth*, *Ephesus*, and *Jerusalem*, were called Parishes, but then it was not only a particular City that was comprehended by that Word; but all the Towns and Villages near that City, within which Circuit there were many Churches and Congregations of Christians. This

This appears by *Eusebius*, who tells us, that *Latus* was Prefident of *Alexandria*, and of the rest of *Egypt*; but that the Superintendency *Parochiarum* belonged to *Demetrius*, who was not only Bishop of the Churches in that City, but also *Parochiarum* that is, of all the Churches where *Latus* had the Civil Government.

In another Place he takes Notice that *Demetrius* was Bishop *Parochiae*, that is, of the whole Church of *Alexandria*; and *Epiphanius*, relates that there were many *Parishes* at that Time within that City.

So that the Word *Parochia*, in its primitive Acceptation, signified a Diocess, and that was such a Part of the *Roman* Empire which was governed by a Lieutenant, called *Vicarius*.

Afterwards, when the Church borrowed the Word of the Civil State, it signified that Division which was within the Jurisdiction of a *Primate*, and that was as large as the Civil Diocess; but as the Word lost its Latitude, and was confined to the Limits of a Country Parish, so likewise the Word Diocess came to be restrained to that which was called a *Parish* before.

But with us here in *England*, for the first 500 Years after Christ, there were no particular *Parishes*, for the Bishop had the Government of the whole Diocess, and the Revenue thereof was paid into his Treasury, and he assigned a Proportion to every *Priest* who officiated in the Churches, which was to be for their Maintenance, so that at first those who are now *Parish Priests* were only Curates to the Bishop.

When Christianity began to spread, by the Conversion of the *Saxons* from Paganism, many Churches were built by Bishops, and some by Laymen; but the Bishops always settled the Endowment, which was usually done by reserving a certain Portion of the Profits, which before that Time were paid into the Common Stock, or Treasury of his Diocess, and annexing it to those Churches, for the Maintenance of the Priests who officiated therein, which Portion thus reserved was to arise within certain Limits, set out likewise by the Bishop himself for that Purpose; and this was done at the Dedication of the Churches to some Saint.

These Limits were appointed according to the Circumstances of Times, Places and Persons, within which the Clergy were ordered to administer their Spiritual Offices. 'Tis true, St. *Austin* made use of some of the *British* Churches; and when the *Danes* ruled here, some of those old Cathedral Churches were standing; and some also of a second Rank, which had Right of Burials and Baptism, and were endowed with Tythes, arising within certain Precincts, which were so large in the Time of the *Saxons*, because the Churches were but few, that Lords of Mannors built more on their own Lands, for the Conveniency of themselves and their Tenants; and by the Bishop's Appointment had a settled Minister amongst them, who was to take

Care of the Souls living within such a District, which afterwards became a Parish.

And by the Way, this may be a Reason why some Parishes are intermixed with others at a great Distance. For where the Lord of a Mannor built a Church, and endowed it with his own Demesnes; 'tis probable that some of these Demesnes might lay beyond the Bounds of the new Parish, and contiguous to another far distant.

As to the Division of Diocesses into Parishes, I find that *Evaristus Bishop of Rome, Anno 110.* and who suffered Martyrdom in the Reign of the *Emperor Trajan*, was the first who divided the City of *Rome* into Parishes, and about 50 Years afterwards his Successor *Dionysius* attempted the like throughout the Christian World; some are of Opinion that the Historians are mistaken in this Matter, and that the Presbyters at *Rome* had no fixed Titles till about the End of the Fifth Century, because before that Time they were generally called Priests of an Episcopal Church, without any further Title; but about the Beginning of the 6th Centry they were called *Johannes Presbyter Tituli sanctæ Cæcilie*; and *Baluzius* mentions the Names of above 60 Persons who subscribed themselves after that Manner, at a Council held at *Rome* about that Time, which shews that they were not only Priests of a Cathedral or Collegiate Church, but had a particular Church of their own.

But the first Division of Diocesses into Parishes here in *England* was made by *Honorius, Archbishop of Canterbury, Anno 622.* and in the Reign of King *Edmyn*, within which Parishes certain Priests were to be maintained by the Tythes arising there, and by other Church-Duties, which they might take in their own Right:

This is agreed by Archbishop *Parker*, Mr. *Cambden*, and by Bishop *Godwin*, who wrote the Life of the said *Honorius*, who all affirm that he was the first who divided his Province into Parishes:

And of this Opinion was that learned Antiquary Sir *Henry Spelman*; but he confesses that very few Authors take Notice of those small Parishes in those Ages, for the whole Diocess was then comprehended by the Word *Parochia*; and this agrees with (a) Mr. *Selden's* Opinion, who likewise affirms that there were no Parochial Churches here in St. *Augustine's* Time, nor for above 100 Years afterwards, which was long after *Honorius's* Death; and the Reason he gives why *Honorius* could not divide all his Diocess into Parishes, is because *Sussex* was in his Diocess, and that County was not then converted to Christianity.

Certainly this is a very frivolous Reason (if I may have Liberty to say it) of so great a Man; for if *Sussex* was not then

(a) Hist. Tythes. 256.

converted, it was no Part of his Diocess, for his Jurisdiction extended only to those Parts of his Province where Christianity prevailed; and therefore, tho' *Sussex* was not converted in his Time, yet he might divide all his Diocess into Parishes:

But we have a further Testimony from our Histories, that there were Parishes here in the Time of *Honorius*; for *Eselbert*, King of *Kent*, having committed great Spoils there, and ruined the Church of *Putta*, who was then Bishop of *Rockester*; that good Bishop fled into *Mercia*, to see whether the Bishop of that Kingdom would be more Merciful than *Eselbert*.

Sexmulp was then Bishop of that Diocess, which was the largest of the *Heptarchy*, (b) but he did not think fit to relieve his Brother out of the common Treasury of the Church, because he was a Bishop; but rather gave him a Church with the Possessions, which must be the Glebe and Tythes; and upon this he lived the Remainder of his Days, so that there was a Parish-Church endowed at that Time.

And this appears a little plainer by King *Edgar's* Laws, which began with Ecclesiastical Canons, concerning the Immunities of the Church; and they tell us at what Times Tythes ought to be paid, and how to be recovered.

'Tis true, those Laws were made 300 Years after *Honorius* lived, and one would think that in all that Time we might find a plainer Evidence for the Parochial Right of Tythes.

But above 50 Years after this, 'tis very plain by King *Canutus's* Laws, viz. That the First-Fruits of Corn, which were payable yearly on St. *Martin's*-day, should be paid by the People to that Church in the Parish where they dwell; and this was long before the *Lateran* Council, which I shall mention hereafter.

From all which, 'tis certain, that in those Days Churches were built within the Precincts of some larger Parishes, and that the Limits of such Parishes were always appointed by the Bishop, who, tho' he might be guided in settling the Boundaries by the Extent of the Founder's Lands, yet it could not be done without his Consent; and that was the Reason a Canon was made for the Consecration of new-built Churches, by the Bishop himself, because none should be built or endowed without his Privy.

If the Bishop gave the new Church a Right of Burial, in such Case the Lord of the Mannor might (with his Approbation, and not otherwise) give some Part of the Tythes to that Church, which before were due to the Mother-Church; but if the Bishop would not allow the new-built Church such a Right, then it remained a Chappel; and if the Lord of that Mannor would have a Curate there, he ought to maintain him at his own Charge; for he was to have no Part of his Tythes, for they were due to the Mother-Church.

(b) Bede Lib. 4. fo. 163.

'Tis true, many of these Districts, within which new Churches were built, did afterwards become Parishes; but even at this Day the Right of the Mother-Church is still preserved in several Places, I mean in respect to the Tythes; Two Parts whereof, arising out of the Lands of the new Parish, are still paid to the old Church, standing in the first Division of Parishes, and this is where the Bishop did not think fit to allow any more than the third Part to the new erected Church.

'Tis a common Opinion amongst Civilians and Lawyers, that there was no Parochial Right of Tythes before the Council of *Lateran*, (c) but that every Man might give his Tythes to what Church he would; this Council was held under *Alexander* the Third, in the Fifth Year of our *H. 2.* but because my Lord *Coke* could find no such Decree made by that Council, he thinks it was settled by a Decretal of *Innocent III.*

But this must be a Mistake, and probably it was first occasioned by our famous Canonist *Lyndwood*, (d) who tells us, that before that Council, *bene potuerunt Laici decimas in feudum tenere, & eas alteri Ecclesie dare*; but certainly he did not mean Parochial Tythes, but such which the Laity held in *feodo*, that is, which were granted to them from the Church, and such they might give to what Church they would.

If my Lord *Coke* had looked over that Pope's Epistles, he might have found one in favour of *Lyndwood's* Opinion; but it was never any Part of the Canon Law, it was only written to enforce those Laws made in the *Saxon's* Time, for the Parochial Payment of Tythes, which had been neglected by the *Normans*; and tho' restored by the Charter of *H. 1.* yet those Laws were seldom put in Execution, till revived by *Adrian IV.* who was an *Englishman*, and the customary Payment enjoined to those Churches where due.

The Laws of King *Edgar* and *Canutus* make it appear, that the Parochial Right of Tythes was settled here in the Reign of the *Saxons*, which Laws are to be seen in Mr. *Lambard*, and by reason of their Solemnity were called, *Antiqua Leges Anglia*; if it had been otherwise Mr. *Selden* would have told us of it; but 'tis so plain, that he * confesses the Parochial Right to Incumbents was then settled, it could not be by the Decretal of *Innocent III.* so many Years afterwards, because he † acknowledges that the Parochial Payment was due of Common Right.

The aforesaid *Lyndwood*, who lived in the Reign of *H. 5.* hath given us a Catalogue of the chief Things in which the Spiritual Court had Jurisdiction; and amongst the rest he mentions the *Bounds of Parishes* for one, concerning which we have several Cases in our Law.

(c) *Lyndw.* 81. b. *Seld.* of Tythes 293. 2 *Inst.* 641. *Dyer* 84. *Cro. Car.* 422. *Palm.* 220. (d) *Lyndw.* 117. * *Seld. Hist.* of Tythes 264. † *De Decretis* cap. 29.

If the *Bounds of a Parish* (e) come in Question in that Court between a *Parson* and *Vicar*, tho' the *Parson* is an *Impropriator*, yet it shall be tried in the *Spiritual Court*, and no *Prohibition* shall go; as for instance, if there is a *Vill* in a *Parish*, and the *Vicar* hath the *Tythes* of the *Vill*, and the *Impropriator* hath the *Tythes* of the rest of the *Parish*, and the Question between them is, whether the Lands out of which the *Vicar* claims *Tythes* are in the *Parish* or *Vill*? This shall be tried in that Court; the reason may be, because the Contest is between *Spiritual Persons*, and the Right of *Tythes* is only in Question; but this would not pass for a reason in a parallel Case, between a *Clergyman* and *Layman*, (f) where a *Vicar* sued for *Tythes*, and the Defendant suggested a *Modus* payable to the *Parson*; here the Contest was between the *Vicar* and *Parson*, who are both *Spiritual Persons*, yet a *Prohibition* was granted.

So if there are Two *Vills* in a *Parish*, and a Question arises concerning the *Boundaries* of those *Vills*, (g) it shall be tried in the *Spiritual Court*; but the Law is not the same where the Question is concerning the *Boundaries* of a *Parish*, between a *Layman* and a *Clergyman*; for if a Suit is brought for *Tythes* arising *inter loca Decimabilia* of such a *Parish*, (h) and the Defendant suggests that the Lands are in another *Parish*, and that he had paid *Tythes* (i) to the *Parson* there, this shall be tried at Law; and the reason is, because the *Inheritance* of the Land out of which the *Tythes* arise may be in Question; as if I hold the Lands as comprised in a *Fine* lying in such a *Parish*, under which *Fine* I Claim, and the *Spiritual Court* should determine that it lies in another *Parish*, this may endanger the *Inheritance*.

So where there was a *Presentment ex Officio* against a Man, (k) for not coming to his *Parish-Church*, and he pleads that it was not his *Parish-Church*, and that he frequented another, a *Prohibition* shall go.

But the *Boundaries* of *Parishes* being now settled by Custom, care is taken to preserve them by *Annual Perambulations*. In some of which *Perambulations* the People have demanded *Refreshments* as of Right, and alledged a Custom for it; as the *Churchwardens* of * *Uffington* in *Berkshire*, Anno 13 Jac. demanded something to eat and drink of a Person who lived in a particular House in that *Parish*, alledging, that those who lived in that House always allowed it; and being denied them, a Suit was brought in the *Spiritual Court* to recover it, but it was held an unreasonable Custom.

The like Custom was alledged, that all *Farmers* of a Farm called † *Longton*, had used to find *Cakes* and *Ale* at a *Peram-*

(e) 2 Rol. Abr. 312. No. 7. (f) Sid. 332. (g) 1 Lev. 78. (h) Cro. Eliz. 178, 228. 2 Rol. Abr. 282, 291. (i) 1 Rol. Rep. 332. (k) 13 Rep. 17. * Moor 916. † 2 Lev. 163.

bulation to the Value of 8 s. but this being a Prescription in *Farmers*, 'tis not good to charge the Land, it ought to have been in Owners.

It hath been a Question, what shall be reputed a Parish within the Statute 43 *Eli.* for Relief of the Poor.

As for instance, *Hinkly* was an ancient Rectory, and had an ancient Church; (1) *Stoke* was an ancient Village, and Parcel of the Rectory of *Hinkly*; that from the Time of *Hen. 6.* there had been a Church likewise at *Stoke*, and that it was reputed as a Parish, and that the Inhabitants thereof had all Parochial Rights, and Churchwardens, and this made it a Parish.

So where the Village of *Tateridge* was anciently Parcel of the Parish of *Hatfield*, (m) and the Tythes there arising were paid to the Parson of *Hatfield*, who always found a Curate at *Tateridge*; but at the Time of making the Statute, *Tateridge* was a Parish in Reputation, and had Churchwardens and Overseers of the Poor, and had made Rates, which were collected and levied by their own Officers; that it had likewise all Parochial Rights, and never contributed either to the Poor of *Hatfield*, or the Repairs of that Church, or joined with them in any Assessment; this made it a Parish distinct from *Hatfield*.

But making Rates alone, without having other Parochial Rights, (n) will not make it a Parish, tho' there was a Chapel there before the making the Statute, and tho' Divine Service was read there at that Time.

Patron. See *Presentation.*

Peculiars.

THOSE Parishes and Places are called *Peculiars*, which are exempted from the Jurisdiction of the proper Ordinary of the Diocese where they lie, both as to Probate of Wills and granting Administrations, &c. and these are distinguished into several sorts.

1. Royal *Peculiars*, which are the Queen's free Chappels, and are under Her immediate Visitation, as She is Supreme Ordinary; as at *Westminster*, (o) when a Prebend of that Church is void, She may collate any Person by Her Letters-Patents; and by Virtue thereof he will be entitled to the Possession, without Institution or Induction, and he cannot be deprived by any Ecclesiastical Authority, but by the Lord Chancellor, or by Commissioners appointed under the Great-Seal for that purpose; and (p) and if he resigns, it must be to the Queen.

2. The *Peculiars* of the See of Canterbury: And this is an ancient Privilege belonging to that Archbishop, that where-ever

(1) Cro. Car. 92. (m) Cro. Car. 394. (n) 4 Mod. 157.
(o) 2 Rol. Abr. 356. (p) Dyer 294.

he had any Lands or Mannors, they were always exempted from the Jurisdiction of the Ordinary of the Place, and made peculiar to the Diocess of *Canterbury*; (q) and we are told that he hath Fifty Seven of these *Peculiars* in his Province.

3. *Peculiars belonging to Deans and Chapters*; not by Virtue of any original Right which they had, but as derived from the Bishop, who by reason of some ancient Composition gave up his Right to them; yet there are some *Peculiars* which still belong to the Ordinary; but if a Man dies possessed of several Goods in several *Peculiars* belonging both to the Archbishop and to the particular Bishop of the Diocess, Administration shall be granted by the Archbishop, and not by the other, *Sid.* 90.

These Compositions may now be lost, (r) but where there hath been a constant Usage for these Societies to grant Institutions, in such Cases they may maintain their Right by Prescription; and this is done by the *Dean and Chapter of St. Paul's in London*, and by the *Deans and Chapter of Litchfield and of York*: But yet, if the Archbishop, in whose Province such a *Peculiar* is, should grant Institution, 'tis not void, but voidable; for he hath Two concurrent Jurisdictions, one as Superior Ordinary to every Diocesan Bishop, the other as Superintendent over all Ecclesiastical Things within his Province; and therefore it shall be intended that he granted Institution upon the Failure of the *Dean and Chapter* to do it, and thus it will be good till avoided.

'Tis like the Case of a Bailiff executing a Warrant within a Franchise; (s) 'tis not void, because the Franchise is still in the County.

4. *Peculiars belonging formerly to Monasteries*, viz. Those Churches and Parishes which they had got appropriated to themselves, either by Grants from the Bishop or from the Pope.

But these at first were not only exempted from the Jurisdiction of the Bishop, for he gave Institution upon any Avoidances; and in the old Appropriations there was always a *Salvo juri Episcopali*.

'Tis true, no Appropriation could be made without the Consent or Confirmation of the Bishop or the Pope; those who were Poor, and could not be at the Charge of a Papal Confirmation, had always recourse to the Bishop, and he might express his Consent in different Forms; for if he only confirmed the Grant of the Lay-Patron, in such Case he retained his proper Jurisdiction, and nothing passed by such Confirmation, but the Right of Patronage.

If he was made a Party, and joined in the Grant, then he gave up all his Right to the Church; but if an Appropriation

(q) Godolph. Repertorium Canonicum 119. (r) 2 Rol. Abr. 357. (s) 3 Lev. 211.

was confirmed by the Pope, that carried a total Exemption from the Ordinary.

Penance.

THIS is an Ecclesiastical Censure of an Offender, and it is inflicted on him in order to make a change or renovation of his Mind; and 'tis made necessary for the Pardon of our Sins,

It consists in confessing our Sins to God in Prayer, in doing Acts of Charity, Fasting, and in making Restitution to those whom we have oppressed or injured; and the Effects of it are a sincere Reformation of our Lives.

But in the Church of *Rome*, Penance is exercised with very little of the Primitive Discipline and Severity, for they have a quick and ready Means to make an Atonement for the most flagrant Crimes when they sin, and confess on purpose that they may sin and confess again, and this makes work for new Indulgences and Pardons.

And that the Reader may the better be satisfied in what I write, a very learned * Person tells us, that he knew a seeming religious Man commit voluntary Perjury, in order to acquit a Criminal, presuming on so easy a Remedy as Confession, after so great a Fault; and that when they are about to confess, some will venture on such Actions at which they will tremble before.

Now where the Expiation is so easy, a Man must be very stupid who will lie under the Guilt of any Crime; for the Priest only tells him that God is merciful, and that whatever Sin the Penitent hath committed, if he still continues in the Church, and is not a *Lutheran*, there is a Remedy always at Hand, and that is by saying some *Ave-Maries* and *Pater-Nosters*, and by enjoining those who are able, to give Alms, and those who are willing, to Fast.

But if the most hard and rigorous Penance should be enacted, a plenary Pardon from the Pope absolves all; and there is scarce a Church in *Italy* which hath not purchased or procured a plenary Indulgence; by Virtue whereof, the Punishment, as well as the Sins of a Criminal are remitted, so as he confesseth them before a Priest; and having communicated, offers up his Devotions at some Altar, together with some Alms, for that must be done, it being expressly inserted in every Grant, and always practis'd, tho' that Clause should be omitted; nay, the Penance is made so easy, that in some Pardons the Sins of the Delinquent are to be remitted if he hath only an *Intention* to confess and to communicate in convenient Time.

* Sir Edward Sandy's *Europa Speculum*, &c.

Before the Reformation, the Censures inflicted by Ordinaries on Offenders were such, as forbidding them the Sacraments, and all other Divine Offices to be performed where they were, except Baptism to Infants, and Extreme Unction to dying Persons; and this Prohibition sometimes extended to whole Kingdoms, especially if the Liberties of the Church were invaded; and not only so, but sometimes the Censure was, that the Offender should be beaten, and this was called *Fustigatio circa Ecclesiam*.

It was a Question, whether this Punishment could be inflicted on a Gentleman, but I see no reason for the Doubt, when a King submitted to it; for our King *Henry II.* alighted from his Horse Three Miles from *Canterbury*, and pulled off his Boots and went Bare-foot to the Tomb of *Thomas Becket*, and fell before it, and was whipped by all the Bishops and Abbots then present, and certainly there were many there to see this unusual Penance; and not only so, but every Monk of Christ-Church had a Lash at him; and afterwards he continued Fasting and Praying all that Day and Night, and would not suffer a Carpet to be put under his Feet to keep them from the Stones, but it happened to be in warm Weather, viz. on the 12th of *July*, 1174.

About the middle of the Second Century there were great Contests with the *Novatians*, whether those who were baptized during the Time of Persecution, should be afterwards received into the Church; at last it was resolved that they should not be totally excluded, but they were to stay some Time before they were admitted to the Communion, that it might appear they were worthy of it by some Acts of Repentance.

Those who accused themselves were sooner admitted to the Sacrament than others, because it was a true sign that they were sensible of their Sins, and sorry to have offended; and therefore the Canons made a difference between such Persons and those who were proved Guilty, both in respect to the Degrees and Times of Penance: And it was the chief Business of some subsequent Councils to settle *Penitentiary Canons* in relation to this Matter; for some Persons were kept in Penance under great Severities, and for a considerable Time, according to the Circumstances of their Cases, and the Nature of their Offences: And this was usual in the *Saxon* Times, as it appears by the *Penitentials* of *Theodore* and *Bede*, where we may see that the Measure of Contrition was proportioned to the Circumstances of Persons and Actions.

The Bishop of *Sarum* tells us, that *Confession* at first was publick; that it was taken by the Bishop, or some other *Penitentiary Priest* appointed by him: But this was found to be inconvenient, for some Sins were Capital, and therefore, lest such should be confessed publickly, it was allowed to make Confessions in private; and this began in the Fifth Century in some Monasteries,

Monasteries, and in the Presence of a Confessor, and afterwards in many Churches where *Penitentiary Priests* attended, who were very expert in this Business.

But tho' the Confession was *private*, the Sins to be confessed were not of that Nature, for there was no Obligation to confess *private Sins*; the Canons were made against publick Offences, and such only ought to be confessed, that the Penance might likewise be publick.

Afterwards *secret Sins* were confessed, and publick Penance was enjoined for such Sins; but this was quite laid aside in the Seventh Century, and particularly here in *England* by the Order of * *Theodore*, Archbishop of *Canterbury*; but secret Penance was every where practised and brought under Method and Rules by the same Archbishop, and in Time it was cunningly managed by Fryars, with so great Art, that they knew all the Secrets of Mankind.

Commutation.] About the end of the Eighth Century, *Commutation* for Penance began, and then *Prayers*, *Pater-Nosters*, and *Masses* were enjoined instead of *Fasting*; and those who had Money, were allowed to commute it to save Penance, and this was received by the Priest under the innocent Name of giving Alms.

So that 'tis a plain bargaining for Sin to save a rich Man from Punishment; and it being made with *Chancellors*, *Commissaries*, *Officials*, and *Registers*, they were restrained by a Decree made in a Convocation, *Anno 1582.* and it was ordered that no *Commutation* should be made any more without the Knowledge of the Bishop.

About the same Time some Endeavours were used to retain the ancient Discipline of Penance, but the People having been so long disused from any open and publick Censures, this could not be effected without the concurrence of the Civil Power; which not being obtained, they let private Confession drop, there being no Command for it in Scripture, and instead thereof the Reformers ordered a general Confession to be made in the Church.

But *Commutation for Penance* is still practised; for we are told that it agrees with the Customs used in the Ecclesiastical Laws, justified also by the Common Law, and by the Statute *Circumspecte agatis* in the Time of *Ed. 1.* and by the Statute *Articuli Cleri* in the Time of his Son and Successor *Ed. 2.*

'Tis true, by the Statute *Circumspecte agatis* it appears, that sometimes a Corporal, and at other Times a *pecuniary Punishment* was inflicted for Adultery, Fornication, &c. but the Statute *Articuli cleri* distinguisheth, *viz.* that where the Punishment is *pecuniary*, and 'tis demanded, a Prohibition shall go; but if Corporal, and the Party will redeem it with Money,

* Burnet Expos. 278. Hist. Reform. 2 Part 66.

in such Case a Prohibition shall not go, and so is *Fitzherbert*; (a) but I do not find that the Judges observed this Law, for they frequently granted Prohibitions, where the Offender, was ready to give Money to commute for Corporal Punishment; infomuch that *Anno 15 Ed. 3. cap. 6.* another Act was made, that the Ministers of Holy Church should not be impeached in the Courts at Law for taking Money (b) for Redemption of Corporal Penance.

But the King never consented to this Act, therefore it was repealed in the same Year it was made.

So that the Ordinaries never refused Money for Commutation, and therefore *Anno 45 Ed. 3.* Complaint was made to the Parliament that they refused to do Justice by inflicting Corporal Punishments on Offenders, but instead thereof took Money; and this was grown so notorious, that *Anno 1 H. 5. (c)* another Complaint was made against them for taking 40 s. and sometimes more, but never less to excuse Adulterers from Corporal Punishments: And the Complainants prayed that it might be enacted, the Ordinaries should forfeit ten times as much as they should receive; the King answered, that he would take care, with the Bishops, to prevent this Abuse, which if they did not he would.

'Tis plain, that Commutation was practised in this Kingdom, when the Papal Power was very great, and that it was an artificial Contrivance to get Money from the Laity, but it can be no reason that because it was used then it must be so now, for 'tis contrary to the ancient Discipline of the Church, which always publicly censured such Persons who were a scandal to it; and this may be the reason why the Lower-House of Convocation, *Anno 1700.* complained to the Bishops of the Scandal which was given by the Non-observance of the Canons, and particularly in regard to Commutation.

Pensions.

THIS is a certain Sum of Money paid in lieu of Tythes, and ariseth either by some Decree made by an Ecclesiastical Judge, upon a Controversy for Tythes, by which they have been decreed to be enjoyed by one, and a Pension instead thereof to be paid to another; or else it may arise by Virtue of some Deed made by the Consent of the Parson, Patron, and Ordinary, and if such Deed should be lost, and the Pension hath been usually paid for 20 Years, then it may be claimed by Prescription, and recovered in the Spiritual Court.

'Tis true, my Lord Coke in his Paraphrase upon the Statute *Circumspecte agatis* (d) was of Opinion, that it could not be

(a) F. N. B. 53. a. (b) 2 Rol. Abr. 283. (c) Rot. Parl. 45. Ed. 3. No. 24. 2 Rol. Abr. 216. (d) 2 Inst. 491.

recovered in that Court, because Prescriptions must be tried at Common Law; but he was of another Opinion in *Sprat* and *Nicolson's Case*, (e) where the Libel was for a Pension, setting forth, that *tam per realem compositionem quam per antiquam & dudabilem consuetudinem ipse & Predecessores sui habuerunt & habere consueverunt annualem pensionem, &c.* Here was both a real Composition and Prescription alledged, and yet no Prohibition was granted, but the reason of it was, because that Suit was between Spiritual Persons; and in such Case he tells us, that the Plaintiff may make his Election to sue for the same, either in the Spiritual Court, or at Common Law.

But in his * *Two Institutes* he distinguishes between a Pension, which has its Essence from a Decree or Sentence of the Ordinary, and a Pension which is claimed by Prescription; the one beginneth by an Ecclesiastical Act of a Spiritual Judge, and therefore in such Case the Remedy is proper in the Ecclesiastical Court; but 'tis otherwise where a Pension is claimed by Prescription, for that must be tried at Common Law, and so it must if a Pension is granted by Deed, by a Parson, with the Consent of the Patron and Ordinary; this was my Lord Coke's Opinion.

At the Time of the Dissolution of Monasteries, there were many of these Pensions issuing out of their Lands, and payable to several Ecclesiastical Persons, which Lands were vested in the Crown by the Statute 31 H. 8. but there is a Saving in the Act to such Persons of the Right which they had to those Pensions; but notwithstanding such a general Saving, those who had that Right were disturbed in the collecting and receiving these Pensions; therefore by another Statute made Anno 34 H. 8. cap. 19. it was enacted, That if any Pension due out of the Lands of the dissolved Monasteries should be wilfully denied by the Occupiers of their Lands to such Persons who were seised thereof within Ten Years before the Dissolution, in such Case upon Suit brought for the same in the Spiritual Court, if the Defendants should be convicted, the Plaintiff shall recover the Value in Damages, together with Costs, and if the Suit is at Common Law he shall recover the like.

Since the making that Statute, a Question (f) happened, whether the Spiritual Court should proceed where the Pension was never demanded, and by consequence could not be wilfully denied; but because that Court had an original Cognizance of the Matter, therefore a Prohibition was denied.

The reason is the same in Cases of Prescription, (g) for a Pension which must be tried in that Court, because they have Cognizance of the Principal Matter, viz. of the Pension, and that shall draw the Accessary to the same Jurisdiction.

(e) Godb. 196. * Fol. 491. (f) 2 Rol. Abr. 300. Plito 6. 2 Cro. 217. (g) 1 Vent. 3.

This agrees with *Fitzherbert*, (b) who tells us that the Parson may prosecute his Suit for a *Pension* by Prescription, either in that Court, or at Common Law, by a Writ of Annuity; but if he takes his Remedy at Law, he shall never afterwards (i) Sue in the other Court, because he hath determined his Election.

'Tis true, Mr. *Sydesin* (k) makes a *Quare* of it, because, both Justice *Windham* and *Twisden* affirmed, that in the Reign of King *James* it was adjudged that a *Pension* by Prescription was recoverable only at Common Law.

But it hath since been resolved that the Remedy is proper (l) in either Court, that is, if the Prescription is not denied, for if it is, a Prohibition shall go, and that must be tried at Law.

And if Two or more are seized of a * Rectory, out of which a *Pension* is demanded, the Suit may be in the Spiritual Court against one alone, because it may be according to the Law and Course of those Courts, tho' 'tis otherwise at Common Law, for there it may be pleaded in Abatement.

Anno 31 Car. 2. the Archbishop of † *Tork* libelled in the Spiritual Court for a *Pension*, setting forth that the Church of *Rillington* was appropriated by Pope *Clement VI.* to the Abby of *Bellard*; and that upon the *Appropriation* the Abbot granted a *Pension* to the Archbishop: Now, tho' this Suit seems to be grounded upon the Pope's Bull; which is expressly against the Statute 28 H. 8. cap. 16. yet this was only as an Inducement to his Title, which is founded upon the Grant of the *Pension*.

Lastly, If upon the Endowment of a Vicaridge, the Bishop decreed, (m) that the Vicar shall pay yearly 20 l. *de fructibus terræ*; this is a *Pension*, and the Ordinary having appointed the Payment as a Judge, the Suit to recover it shall be in the Spiritual Court.

But where there is no Incumbent, if the Patron and Ordinary make a Grant of a *Pension*, there they charge an Interest, and that must be sued and recovered at Common Law.

Pentecostals.

THESE were Oblations made by the Parishioners to their Priest at the Feast of *Pentecost*, which are sometimes called *Whitsun-Farthings*; but they were not at first offered to their Priest, but to the Mother-Church, and this may be the reason that the *Deans and Prebendaries* in some Cathedrals are entituled to receive these Oblations, and in some Places the *Bishop and Archdeacons*, as at *Gloucesters*:

(b) F. N. B. 51. b. (i) Hardres 230, 388. (k) Sid. 146.
(l) 1 Vent. 120, 265. 2 Lev. 128. * 1 Vent. 335. † 2 Lev. 251.
(m) Cro. Eliz. 675.

They were paid to the Mother-Church at *Worcester* before the Dissolution, and when *H. 8.* endowed that Church after the Dissolution he restored the *Pemecostals* to them.

The Original of these Offerings might be either at the founding or dedicating of a Church, or at some other great Solemnity, and reserved by the Bishop by way of an Agreement between him and the Founder, and settled upon the Episcopal See, and payable yearly at *Whitsunide*.

Afterwards when the Bishop admitted a *Priest* to officiate in a new-built Church, he might appoint the Payment of *Pemecostals* to him who had his Maintenance before out of the common Stock or Treasury of the Church; and this continuing for some Time, the Secular Clergy have now a settled Right to receive it where it hath been usually paid.

Perambulation. See *Parishes*.

Plenary.

THIS is derived from the Adjective *Plenus*, and 'tis a Term used in Ecclesiastical Affairs, signifying that the Church is full of an Incumbent.

And this is made either by *Institution* or *Collation*. 'Tis a *Plenary* immediately upon Institution (*a*) as to the *Spiritualities*, and 'tis good against a common Person, though not against the *Queen*; but this must be understood where the Presentation is in Her, for in such Case there must be a compleat *Plenary* by *Induction* (*b*) as well as *Institution*, and therefore if She Presents, and Her Clerk is instituted, She may remove Her Presentation, and so make it void at any Time before *Induction*.

But where She hath no Right to Present, (*c*) in such Case the bare Institution of a Clerk of a common Person, without any Induction, is a good *Plenary* as well against Her, as all other Persons.

If a Stranger should Present upon Her Right (*d*), and his Presentee should be instituted and inducted, though this is no *Plenary* to bar Her, yet She cannot lawfully Present till the Incumbent is removed by a *Quare Impedit*; for if a Person, who had no manner of Right, presented to a Church, and his Clerk was admitted and instituted, this by the Common Law was such a *Plenary* that it put the right Patron out of Possession, and he could not recover it but by a Writ of Right of Advowson; and even in such Case he could not remove the Incumbent, that he certainly lost his Presentation *pro hac vice*, because the Institution was a judicial Act of the Bishop, and the Law presumes he will do no wrong.

(a) 4 Rep. 79. Poph. 133. Dyer 348. (b) 2 Roll. Abr. 349.
 1 Leon. 156. (c) 2 Roll. Abr. 349. (d) 2 Roll. Abr. 349.
 6 Rep. 49. b.

But the Statute of *W. 2.* provides a Remedy against this Inconvenience, and gives the Patron a *Quare Impedit* to recover his Presentation notwithstanding such a Plenarty, *dummodo breve infra tempus semestre impetretur.*

So that Plenarty is now no good Plea to (e) *Quare Impedit*, unless the Incumbent had been in Possession for *Six Months* before the Writ brought, for if the true Patron brings his Action within that Time, 'tis good.

But Plenarty for *Six Months* (f) is not pleadable against the Queen, for She may bring the *Quare Impedit* at any Time, because *nullum tempus occurrit Regine*, (g) yet if a Title devolves to her by *Lapse*, and the Patron Presents his Clerk by Usurpation, who is instituted and inducted, and enjoys it for *Six Months*, this is such a Plenarty which deprives Her of the Presentation.

There is another Plenarty which is made by *Collation*; and in such Case if a Bishop **Plenarty by Collation.** Collates who has *no Right*, this doth not put the true *Patron* out of Possession, because 'tis only a Provision to supply the Cure till the Patron doth Present, and that is the Reason why a (h) Plenarty by *Collation* cannot be pleaded against the right Patron.

But such a wrongful *Collation* shall make a Plenarty, which will be a bar to any *Lapse* to the Archbishop, and to the Queen, though 'tis no bar to the Right Patron, and it likewise puts him out of Possession who hath a Right to Collate.

Lastly, *Plenarty* or not shall be tried by the Bishop's (i) Certificate, because 'tis acquired by Institution which is a Spiritual Act, but in a *Quare Impedit* the *Plenarty* must be tried by a Jury.

Plurality.

THIS is where the same Person obtains Two or more Spiritual Livings with Cure of Souls, in such Case the first is void *ipso facto* without any Sentence of *Deprivation*, and the Patron may Present to it, for the Law enjoins Residence, (k) and 'tis impossible that the same Person can reside in Two Places at the same Time.

At Common Law, and before the making the Statute 21 *H. 8.* the first (l) Living was void immediately upon taking the second, but then it was at the Election of the Patron to take Notice of this Avoidance or not, that is, he might Present if he would, but if he did not, yet no *Lapse* should incur; but now by that Statute he must Present *within Six Months*, if the first Living be above the Value of 8 *l. per Annum.*

(e) Hob. 322. Sid. 163. 2 Inft. 360. (f) 2 Inft. 361. (g) 7 Rep. 28. (h) 6 Rep. 29. 6 Rep. 50. (i) 6 Rep. 49. (k) 2 Roll. Abr. 360. (l) 4 Rep. 75. Moor 542.

It would take up a great deal of Time to mention all the Councils which prohibited Pluralities; 'tis sufficient to mention that the *Council of Trent* affirmed them to be the Subversion *totius Ordinis Ecclesiastici*; and by another (*m*) Council, that it brings a Scandal on the Christian Church, and that 'tis an hindrance to the publick Worship, and to the good of Souls, and that it favours to much of a worldly Mind.

But if the Pope dispensed with a Pluralist, all these Inconveniencies were remedied; and therefore before I treat of the Statute 21 *H.* 8. I shall take Notice how the Law stood before that Time in relation to this matter.

In the *Lateran Council* a Canon was made, that no Minister should take Two Parish Churches, or Two Dignities in the same Church; but this Canon had no effect, for the Ordinaries usually granted Dispensations to take Two or more Benefices with Cure.

About 60 Years afterwards *Cardinal Othobon*, who was Legate here from Pope *Innocent IV.* at a Council held in *London*, appointed that the Institution to the second Benefice should be void; but in another general Council held at the same Place, not long after another Canon was made, that upon taking the second Living, the Clerk should be deprived of the first, and all Power of Dispensation in such Cases was taken from the Ordinaries; and *Lynwood (n)* tells us the Reason, *viz.* because they did not use it with Discretion, but the Pope had still the same Power, for he knew how to use it better.

This last Canon was confirmed by *Archbishop Peckham*, and because it did not mention *what Value* the second Living should be, therefore the Law, before the making this Statute, was, that if the second Living was of never so little Value, yet the Acceptance of it avoided the first, and the Patron might Present; and if the Incumbent contested the Matter with him, then he was to be deprived of both.

But it seems the Pope who had the sole Power, of granting Dispensations, made as bad use of it as the Ordinaries, for he made extravagant Grants to unworthy Persons, and by this means those Canons became useless.

Then it was a proper Time to provide a Remedy, and this was done by the Statute 21 *H.* 8. cap. 13. *viz.* *That if any Person, having one Benefice with Cure, &c. being of the yearly Value of 8 l. or more, shall accept another with Cure, and be instituted and inducted into the Possession thereof, that immediately after such Possession the first Benefice shall be void, and the Patron might Present another, and that his Presentee was to have the Benefit of the same as if the Incumbent had died or resigned, and that any License, Union or Dispensation to the contrary should be void.*

(*m*) Council Paris. 6. cap. 49. (*n*) Lib. 3. cap. 18.

'Tis true, the Statute is, that the Person must be instituted and inducted into the second Living; but yet a bare Institution without Induction will make an Avoidance, for otherwise a Man may get Institution to several Benefices, and hinder other Persons to be presented, and, by getting Sequestrations of the Profits, may not only defeat this Act, but all Canons made against Pluralities.

So that a *Dispensation* after an *Institution* (o) comes too late, because by the *Institution* the Church is full against a common Person, and therefore he cannot have a *Dispensation retinere* that which he had before.

I must agree with Sir *Simon Degg*, that this had been an excellent Law against Pluralities, and all Dispensations to obtain them, if it had gone no farther, but there are so many Qualifications to be a Pluralist, that the Power of Dispensation was only taken from the Pope, and scattered (as he calls it) amongst the Nobility, for there being about 4300 Benefices in *England*, of 10 *l. per Annum*, in the Queen's Books, the Nobility can qualify above 1000 Chaplains, besides those of the Queen, and probably as many might be qualified by Birth and Dignities, which make the Act almost as useless as the Canons.

But some learned Men are of Opinion that such Dispensations cannot satisfy a Man's Conscience without a *Prævious Cause*, and if any Cause may be allowed to make a Pluralist, it must be where the Benefices are mean, and are near together, and it seems to be clear that the Parliament had a regard to the Poverty of some Benefices, because the Act doth not make the second Living void where the first is under 8 *l. per Annum*, that is, according to a Valuation made *Anno* 26. *H. 8.* and then returned into the Exchequer, and now in the First-Fruits Office, and not according to the real Value, for the Livings, which are worth 50 *l. per Annum*, are valued in the King's Books at 8 *l.* and no more, tho' some * Books are to the contrary.

I admit that the Damages recovered in a *Quare Impedit* shall be try'd according to the *Real Value*, because 'tis against a Wrong-doer, to the Prejudice of another Person; but by the Acceptance of a second Benefice, no injury is done but to the Party himself; therefore the same Reason doth not hold in that Case; besides the Statute was made for the Ease of the Clergy, that there might be a certain Measure of the Value of every Church, and not left to such an Uncertainty, as might be in the *Real Value*, for that may vary every Year.

And even in such Case where the Livings are contiguous, great care ought to be taken to put in able Curates, with a competent Allowance; and the Rectors themselves ought to take all Opportunities to perform the Duties of their Function, notwithstanding there are Curates to supply their Places, for

(o) 2 Roll. Abr. 359. 4 Rep. 79. * Noy 38. Cro. Eliz. 853.

'tis the constant and necessary Attendance on Parochial Cures, which is chiefly regarded by the Act: And this appears very plain, because Dignities in the Church are not comprehended under the Name of Benefices with Cure, as Archdeacons, Chancelorships, Chantorships, Deanries, Prebends in Cathedral or Collegiate Churches, Parsonages where there is a Vicar endowed.

But admitting a Clergyman hath a Dispensation to hold Two Livings with Cure, &c. * and afterwards he accepts a Third, if the Dispensation is particular, that is, if it expresses the very Benefices which are dispensed to be retained, then if he hath no other Dispensation, the Two first are Void, but if he hath only a general Dispensation to hold Two Benefices, without naming them, then if he accepts a Third, the first is only Void.

Before the making this Act, any Person might be deprived by the Ecclesiastical Law of his first Benefice, for taking a Second without a Dispensation, let the first be of of what Value it will, as hath been before observed. Now the Statute only provides, that he who takes Two Livings *above such a Value*, shall have no Title to the first, so that it doth not alter the Ecclesiastical Law, nor take away any Power which the Bishops had before; if that had been intended there should have been an express Clause for that purpose, for no antecedent Rights can be taken away by Implications, and if so, the ancient Ecclesiastical Law is still in force; and then if a Clergyman hath one Benefice *under the Value of 8 l. per Annum*, and accepts another *above that Value*, but without any Dispensation, tho' he is not punishable by the Statute, yet he may be deprived of the first by the Canon Law.

But if that Law is still in force, yet the taking Two Livings is not *malum in se*, 'tis only *malum quia Prohibitum* by those Canons, and such an Evil may be dispensed withal, in order to some Publick Service, or for the Reward of Learning or Merit, especially where the Maintenance is insufficient; and this appears to be the Sense of some ancient Canons; for in the last Year of Hen. 3. a Canon was made that *circa Sublimes & literatas Personas, quæ majoribus Beneficiis sunt honoranda, cum ratio postulaverit, per sedem apostolicam poterit dispensari duo Beneficia retinere.*

And some of those Canons allowed an Union in such Cases, which was no more than the Act of the Bishop in uniting Two Churches for the better Support of the Incumbent; and 'tis as reasonable now that the Bishop should unite Two small Benefices for the Maintenance of a learned Person, who may be of publick Service to the Church; this is allowed by the Canons (a) of our Church, which provide that a Dispensation may be

* Noy 149. (a) Canon 41.

granted to a Person thought Worthy by his Learning, and able and sufficient to discharge his Duty; that is, to one who hath taken the Degree of Master of Arts in the Universities of this Realm, and who is a publick and licensed Preacher, so that he give caution to reside on one of his Benefices for some reasonable Time in the Year, and that the said Benefices are not more than 30 Miles asunder, and so that there is a licensed Preacher in the Benefice where he doth not reside.

'Tis true, some Churchmen have condemned Pluralities upon any Account whatsoever, and particularly Pope Adrian VI. whilst he was Dean of *Lovain*, maintained that a Man who had got a Living sufficient for his Support, ought to be contented with it; and to take no more, for Multiplicity of Benefices ought not to be crowded under one Hat, but when he was Pope, he acted quite otherwise; and being put in Mind of his former Opinion in this matter, he reply'd in the Words of St. Paul, *When I was a Child, I spoke as a Child, &c.*

I shall now proceed to shew in what manner Persons may be qualified to have Dispensations to hold Two Livings; and that is, by

1. Retainer,
2. Birth,
3. Dignity.

As to the Qualification by Retainer or Service, you may see it at large under the Title *Chaplain*, only here I shall take Notice, that if a Lord, or other Person doth retain his full Statute Number, and likewise some more, those Supernumeraries are not qualified for a Plurality, tho' they should be first preferred. (b)

So if any Peer shall have a double Capacity to qualify Clergymen, as if a Baron should be made Master of the Rolls, he can qualify only according as he is a Peer, and no more, for that is his best Capacity.

So that if the eldest Son of a Peer retaineth Chaplains in the Life-time of his Father, who afterwards dies, such Retainer will not qualify those Men, because the Son was not capable to do it at the Time of the Retainer.

By which it appears, that the Person retaining must be capable thereof at the Time of the Retainer, and he must likewise continue in that Capacity till his Chaplain is advanced, for if he dieth, or is removed from his Office before that Time, his Qualification is determined.

But if a Baroness, being a Widow, Retains Two Chaplains, (c) and Marries before either of them are preferred to a second Living, this Retainer is good, and the Person may have a Dispensation to hold such a Living, tho' at the Time of his accept-

(b) Dyer 312. Moor. 277, 678. Cro. Eliz. 723, 839. 4 Rep. 90. Moor 561. (c) 4 Rep. 118. b. 79,

ing it the Baroneſs was not in the ſame Capacity as ſhe was at the Time of the Retainer.

And 'tis to be obſerved, that theſe Retainers (d) muſt be before the Inſtitutions to the ſecond Benefice, for if they come afterwards 'tis too late, becauſe the Words of the Statute are, *viz. That it ſhall be lawful to purchaſe a Diſpenſation to receive and take Two Benefices with Cure, &c.* which he cannot do after Inſtitution to the Second, becauſe the Church is then full as to the Spiritualities, and by conſequence he cannot receive what was his own before.

Qualifications by Birth.] 2. *Qualification by Birth.* And this is where the Clerk is Brother or Son of any Temporal Peer, or the Son of any Knight born in Marriage, ſuch Perſons may have Diſpenſations to hold Two Livings; ſo that the Son of a Knight hath in this reſpect a greater Privilege than the Son of a Baronet, becauſe that Dignity was not created when this Statute was made.

Qualification by Dignity.] 3. *Qualification by Dignity* is, where Perſons are admitted to the Degrees of Doctors and Bachelors in Divinity, or in the Civil Laws in either of our Universities.

In all thoſe Caſes where a Perſon is qualified by Service, he muſt carry his Teſtimonial or Retainer under the Hand and Seal of his Lord, to the Maſter of the Faculties, who is to make out Diſpenſation, and this muſt be ſealed afterwards under the Great-Seal, and then he may apply himſelf to the Biſhop of the Dioceſs for Inſtitution, and not before; for tho' the Statute is, that the firſt Living ſhall be void when the Party is inſtituted and induſted to the Second, yet to avoid Inconveniencies it hath been held that the firſt Living is Void upon the Inſtitution to the Second; for otherwiſe a Man might be inſtituted to ſeveral Benefices, not being able to ſerve the Cure of one.

Preaching.

WHEN the Heathens were firſt converted to Chriſtianity, there was an abſolute Neceſſity of Preaching; and that it might be performed with the greater Solemnity, it was uſually done by Biſhops, eſpecially in the *African* Churches, and it was likewiſe ſo peculiar to the Biſhops of the *Gallican* Church, that they called their Office *Prædicationis Officium*; in the Royal Conſecration they were required to be diligent in Preaching; and *Charles* the Great was ſo ſtrict in enjoining it, that he cauſ'd thoſe Biſhops to be depoſed who neglected this Duty.

And in this they ſeemed to imitate the Zeal of the Primitive Fathers, who were called Preaching-Biſhops, Men who were oftner ſeen in *Pulpits*, than in Palaces, and more employ'd in the

(d) 4 Rep. 77. b.

Business of him who sent them to *Preach* the Gospel, than in the Embassies of Emperors and Kings.

But by degrees Bishops declined *Preaching*, otherwise there had been no Occasion of a Canon to enjoin it, which, *Zonaras* tells us, was made in a general Council held in the *Trullo*, about the latter end of the Sixth Century, enjoining Bishops to *Preach* often, at least once on every Lord's-Day, or to be Canonically admonished for neglecting it; and if they did not reform upon such Admonition, then they were to be excommunicated or deposed.

'Tis probable this Canon was made to suppress the frequent *Preaching* of Presbyters, which obtained in the Fourth and Fifth Centuries, who in their Sermons might favour the Heresies of *Arius* and *Donatus*, which were revived in that Age, in which this Canon was made, especially in *Africa*; for I do not find that Presbyters were allowed to *Preach* in those Churches, till the Time of *St. Austin*, who usually heard *St. Ambrose* every Lord's-Day; and he tells us, that he accounted it the proper Office of a Bishop to perform this Duty, but at last he obtained leave of *Valerius*, who was his Bishop, to *Preach* before him.

This gave Offence to many other Bishops, but, it afterwards proving very serviceable to the Church, the Bishops by Degrees gave the Presbyters leave to *Preach* before them, and when an ill use was made of it, they were forbidden again, as when the *Arian* Heresy first began, the Presbyters of *Alexandria* were prohibited to *Preach*.

In the Church of *Rome* there was no *Preaching* at all, for if there had, 'tis probable we should find something of it in the *Old Roman Offices*, which are silent as to this Matter.

'Tis true, *Cardinal Bona* tells us, that it was the uninterrupted Practice of the Church, from the Apostles to his Time, for the Sermon to follow the Gospel, but he brings no Proof that it was observed in the Church of *Rome*, or any where else; and *Sozomen* takes particular Notice that it was the peculiar Custom of that Church, not to have any manner of *Preaching* * either by Bishops, or Presbyters, till the Time of *Leo* the Great, about the Year 440. for he was Pope about the Middle of the Fourth Century, and was the first who performed that Office in that Church on solemn Occasions.

I admit, that *Gregory* the Great, who succeeded in the Popedom about 150 Years after *Leo*, in his Homilies on the Prophet *Ezekiel*, and on the Gospels, mentions that some of the Bishops of *Rome* were frequent Preachers, and this may very well consist with what *Sozomen* had observed concerning that *Leo*, who preached at first upon some solemn and publick Occasion; but in *Gregory's* Time, who lived so long after him, it became an usual thing.

* Lib. 7. cap. 19.

As to us here in *England*, when the Bishops lived with their Presbyters in the Cathedrals, they sent them out to Preach as they saw Occasion, and where they were most likely to do Service to the Church; but when they became settled in their Cures, and were no longer Itinerary, they were required to be diligent in Preaching; and this Duty was enforced upon them by several Councils, as by a Council held at *Oxford*, Anno 8 H. 3. it was decreed, That all Rectors should Instruct their Parishioners in the Word of God: But this Decree was not regarded as it ought, for in the very next Reign we find that great complaint was made in a Provincial Council of the Ignorance of the Parochial Clergy, (e) that they were not capable of Preaching, and probably it might be neglected by them, because a certain Order of Men called the Preaching-Fryars had taken it up, so that by this Council the Secular Clergy were only enjoined to read an Exposition on the Creed, on the Ten Commandments; the Two Precepts of Charity; the Seven Works of Mercy; the Seven deadly Sins; the Seven principal Virtues, and the Seven Sacraments, and this only Four Times in a Year.

It was *Wickliffe*, who by frequent Preaching revived this Duty in the Minds of the People, so that a new Provincial Constitution was made by Archbishop *Arundel*, enjoining the Parochial Clergy to Preach again, and giving Authority to those Mendicant Fryars who had no special Cures, that they might Preach in *Ecclesiis & Plateis*, but not without leave from their Superiors, but the Secular Clergy were to Preach to their own Parishioners, without any Manner of License.

'Tis true, if any one preached in a strange Place, he was first to be examined by the Bishop, and if he was *idoneus tam moribus quam scientiâ*, then he might send him to as many Parishes as he thought fit, but he was to shew his License to the Incumbents before he was suffered to Preach.

In the Reign of *Hen. 7.* Preaching was in so great Reputation, that the Queen's Mother employ'd *Fisher*, Bishop of *Rocheſter*, to find out the most Eminent Preachers in those Days, that She might maintain them at Her own Charge; and though it was afterwards so much valued by *Erasmus*, and other great Men of that Age, yet there were very few Sermons preached but in Lent.

The Fryars indeed made some Discourses on Holidays, not to Instruct the People to lead Holy and Virtuous Lives, but to magnify that Saint to whom the Day was dedicated.

In Lent there was more serious Preaching, but it was not so serious as it ought; for it was chiefly to applaud the Laws of the Church concerning Abstinence at that Time, Confession of Sins, and some other Corporal Severities.

(e) Prov. Conſtit. de Officio Archpresbyt. fo. 282.

The Reformers of those Laws in the Reign of H. 8. (f) called Preaching *Officium Praclarum*, to which no Man ought to be admitted, *nisi Pietatem & convenientem Doctrinam secum adferat*; and that none should presume to preach without a lawful Call by those who had Power to admit him to it, and not every one *qui Spiritu Dei se jactat afflatum*; but the Bishop should have a due Consideration of the Life and Learning of those whom they admit to this Office, by which they might be satisfied that the Spirit proceeds from God.

I know 'tis objected against this Power of the Bishop, that Medad and Edad (g) prophesied amongst the People, without any Commission from Moses; (h) that Apollos taught in the Synagogue, tho' he was not set apart for the Ministerial Function; and that St. Paul himself, tho' a great Preacher, yet he was but a Tent-maker.

In answer to the first of these Instances, no Man can imagine that miraculous Prophecy hath any Manner of Resemblance to our common and usual Preaching; and as for the teaching of Apostles in the Synagogue, it was no more than a solemn Decision of some controverted Points in Divinity, which, in those Days, was performed by the Laity as well as the Clergy; and tho' St. Paul was a Tent-maker, yet he never preached as such; for when he worked at his Trade, it was upon a particular Occasion to supply his common Necessities, that he might not be a Charge to the People; but he never preached till inspired by the Spirit of God, which none but Enthusiasts and some of our modern Prophets will pretend to.

'Tis likewise objected, That some of the Disciples, who had no Authority from our Saviour to preach, yet when they were separated from him, and dispersed thro' the Nations of the Earth, they are said in (i) Scripture to go forth every where Preaching the Word; but it was in unsettled Times, when any Man was allowed to preach the Gospel, that it might the sooner be propagated amongst the People.

But when once the Church was established, then the Clergy were soon distinguished from the Laity; for our Saviour himself appointed some to be Apostles, some to be Evangelists, (k) and some to be Pastors and Teachers; he gave them likewise an Account of their Mission, by telling them, as his Father sent him, so he sent them.

Then after his Crucifixion, the Apostles placed Bishops and Elders, and Deacons, in the Church, and this was for the perfecting the Saints.

Now, if those, who were not lawfully set a-part for the Ministry, might supply that holy Function, there had been no

(f) Reform. Leg. Ecclesiast. 34. (g) 11 Numb. 26. (h) 18 Acts 24. (i) 8 Acts 411. v. 19. (k) 4 Eph. 11.

Occasion of so much Care in the Original Settlement of the Christian Church.

Besides, 'tis not a Work very easy to make Reconciliation betwixt God and Sinners, it requires some Application to Learning, and Study in Divinity, in order to a right Understanding the Scriptures, and we should have but very few puffed up with an Imaginary Blast of the Spirit, or start into a Pulpit from a Shop; if such Men would take *St. Basil* and *St. Gregory* for a Pattern, who, as *Rufinus* tells us, spent 13 Years in studying the Scriptures, and searching after the Sense thereof, before they entred upon the Ministry; and I do not believe that the Spirit of God exerts it self in a more peculiar manner in them, who now pretend to it, than it did in those holy Men of old, but rather an opinionative Spirit of their own; and such are called by the Prophet *Ezekiel* (1) foolish Prophets, and not only so, but a Wo is denounced upon them.

So necessary was it to study the Scriptures in those primitive Times; for the first Act of Divine Service was reading them, afterwards singing, and then the Bishop preached, which was nothing else than an Exposition of the Lesson then read, as being fresh in the Minds of the People, concluding with an earnest Exhortation to stir them up to the Imitation of those excellent Things which were delivered in the Word of God, and which had then been explained to them Verse by Verse.

The Sermons of After-ages were of a very different Nature, notwithstanding, that about the Beginning of the Reformation here, great Care was taken to send Eminent Preachers throughout the Kingdom; and these were not confined to particular Places, but had the King's License to Preach any where.

But the Sermons of some of those Preachers were no more than Investives against the Friars, and some other Persons, who did but faintly conform to the Changes then made, and had still some of the old Leaven in them; so that the Government did not think it safe to leave the Progress of the Reformation to such blind and ignorant Guides, therefore Two Books of Homilies were composed; One of them was published in the Reign of *Ed. 6.* and the other soon after his Death, which being only short and practical Discourses upon some Places of Scripture, were enjoined to be read in the Churches, in order to oblige both the Ministers to teach, and the People to be instructed according to the Form of a godly and sound Doctrine.

But Incumbents legally possessed of any Ecclesiastical Living might preach in their own Parishes, without the King's License; and the Homilies were often laid aside for the Sake of Preaching, by those to whom the Bishops gave Licenses so to do; and those Preachers thus licensed contradicting the Opinions of others in relation to the great Change then made in

(1) 13 Ezek. 3.

Religion, that good King *Ed. 6.* issued forth a Proclamation, prohibiting the Bishops to grant any more Licenses to Preach, and that none should be obtained but of him and the Archbishop of *Canterbury*.

This must certainly have lessened the Number of Preachers; of which there were not very many in those Days; for I find that *Mr. Aylmere*, who was afterwards Bishop of *London*, was the only Preacher in *Leicestershire* in that Reign, being favoured by the Duke of *Suffolk*, whose Seat was in that County.

But it seems those very Persons, who got Licenses from the King and Archbishop, did not make good Use of their Liberty, for that King, by another Proclamation, inhibited *Preaching* in general throughout the Kingdom, to the Intent the Clergy might apply themselves to *Prayer*, in order to implore a Blessing upon what was then in Agitation, which was an uniform Order of *Common-Prayer*, and that they should read the Homilies in the mean Time.

About Two Years after this *Proclamation* some of the Clergy began to preach again, but it was on Week Days; and these were called Lecturers, which being a new and unusual Performance, many People came to see and hear them from neighbouring Places; and this begat an Emulation amongst the Clergy, which of them should draw most People to be their Auditors.

The learned Bishop of *Sarum* tells us, that as to this Matter there have been Excesses on both Sides; for some with great Sincerity have kept up those Lectures in Market-Towns, and others have continued them with Faction, and with a Design to detract from those godly Ministers, who were not very Eminent in Preaching; and this gave a Prejudice to some Persons in Authority, who endeavoured to suppress all Performances of this Nature: And the Preachers, being by this Means possessed with an Opinion that this would be a Hindrance to Piety, have endeavoured to keep up a Zeal in the Minds of the People for Lectures, which (he tells us) since they have been freely preached, have not produced those ill Effects which followed many Years since, when Means was used to suppress them.

But to proceed, in the first Year of Queen *Mary's* Reign, Preaching was again prohibited without her Leave; and this happened by the Indiscretion of one *Bourne*, who was Bishop *Bonuer's* Chaplain, who, Preaching at *St. Paul's*, reflected severely on the Proceedings in King *Edward's* Reign, insomuch that his Hearers were so incensed at his Sermon, that one of them threw a Dagger at him with very great Force, but the Parson saved himself by stooping, and the Dagger stuck fast in the Pulpit.

This Prohibition of that Queen was an effectual Means to restore Popery; for it must be difficult in her Reign for any of the reformed Religion to get Licenses to preach, which were freely offered to those of the contrary Opinion.

Thus

Thus *Gardener*, Bishop of *Winton*, licensed several to preach in any Cathedral, or Parish-Church, and this most of the Clergy submitted unto, yet some had the Courage to preach publicly, notwithstanding the Queen's Prohibition; but they were committed to Prison, and prosecuted as disaffected Persons to her and her Government; and thus it stood during her Reign.

But all this while we have no Account of any Preaching by Bishops, for that was almost refused, insomuch that, in Queen *Elizabeth's* Reign, when *Pius Quintus* preached a Sermon, it was looked on as one of the Wonders of that Age.

In the Beginning of that Queen's Reign there was so great a Scarcity of Ministers who would comply to the Reformation, that she licensed *Laymen* to preach publicly; and we have an Account of an * High-Sheriff of *Oxfordshire*, who, in the first Year of her Reign, preached the Assize-Sermon in the University there; but 'tis probable he did not perform it *absque cujuslibet subtilitatis textura fantastica*, for so Preaching was called in *Ed. 6.* Time, tho' tis very remarkable that a *Layman* should preach in an University where so many of the Clergy are educated.

But they were so illiterate at that Time, that several of the Lower-House of Convocation who subscribed the Articles of our Religion in the Year 1562. wrote so ill, that their Names are scarce legible; and the High-Sheriff before-mentioned, with his Sword by his Side, shewed so much *de textura fantastica* in his Sermon, that he told the People *he was arrived at the Mount of St. Mary on the stony Stage, whereon he stood; that he brought them some fine Biskets baked in the Oven of Charity, and carefully conserved for the Chickens of the Church, for the Sparrows of the Spirit, and for the sweet Swallows of Salvation.*

But 'tis no Wonder that a Sheriff should make such a ridiculous Discourse, when a *Jesuit* many Years afterwards, employed by his Superiors to preach, was none of those, mentioned in the Scriptures, *whose Wisdom shined in their Faces*; and this was the famous Father *Maimbourg*, who, Preaching on the first Sunday after *Easter*, when the Gospel about the good Shepherd was read, took Occasion from thence to magnify that Employment; and having told the People how many Patriarchs were Shepherds, he likewise mentioned some Kings who look'd after Sheep, and particularly of *David*, of whose Dog he gave this Account; that whilst his Master was fighting with *Goliath*, that Dog fought with a Wolf; then he divided his Sermon into Four Parts, according to the several and common Sorts of Dogs; the first Sort he said were *English Dogs*, and those were the *Jansenists*, who fastened on every Body, without distinguishing the Innocent from the Guilty; the second Sort were

* *Dr. Langbaine's* Preface to a Book entitled, *The true Subject turned Rebel*; the Book was written by *Sir John Cheek*.

Maſſiff-Dogs, and to thoſe he compared ſuch Preachers who ſpoke bold Things in their Pulpits, and were cowardly every where elſe ; the Third Sort were Lap-Dogs, and thoſe were the Court-Abbotts, who made a great but very deſpicable Noiſe ; and the Fourth Sort were the good Dogs, and theſe were the *Jefuits* ; another *Jefuit* being to preach on the Seven Anthems which their Church ſings before *Chriſtmas*, and which begin with the Letter *O*, he took that Letter only for his Text, which we may imagine to afford him many fine Thoughts.

But to return ; in the Reign of Queen *Eliz.* one Preacher ſupplied ſeveral Cures, for the greateſt Part of the Parochial Clergy, being unable to preach themſelves, were obliged to hire thoſe who were able to perform this Duty ; and for the greater Encouragement of Preaching-Minifters, it was enacted in the (a) 13th Year of her Reign, That none ſhould be admitted to a Benefice with Cure, &c. of above 30 l. yearly Value in the Queen's Books, but a Bachelor of Divinity, or a Preacher lawfully allowed by ſome Biſhop, or by one of the Universities.

But the chief Reaſon of making that Act was, that the Churches might be filled with Men who ſhould preach ſound Doctrines ; for at that Time there were many who preached otherwiſe, inſomuch that, Eight Years after the making that Act, the London-Clergy were cited to meet in St. Sepulcher's Church, where ſeveral of them were ſworn to enquire if any Perſons meddled with State-Affairs, or preached without Liſenſe ; and in the ſame Year an Order was made that no Incumbent ſhould ſuffer a Stranger to preach in his Church.

Afterwards a Canon was (b) made, to enjoin them to preach one Sermon every Sunday in the Year, either in their own Pariſhes, or in ſome other Church or Chappel where there was no Preacher.

But yet theſe beneficed Clergy muſt have an Allowance to be Preachers ; for if they were not *Licenſed*, then another Canon requires them to procure one who was, and he was to preach once in a Month in the Pariſh-Church, and on other Sundays to read the Homilies.

And no Strangers were admitted to preach, without producing a Liſenſe (c) for that Purpoſe ; and that the Biſhop might have an Account of them who tranſgreſſed in this Matter, the Churchwardens were enjoined to keep a Book, (d) wherein the Perſon ſo preaching was to ſubſcribe his Name, and the Day when he preached, and the Name alſo of that Biſhop who gave him Liſenſe to Preach.

And no Perſon was to oppoſe the Doctrine (e) in one Church, which was delivered in another, without firſt acquainting the Biſhop with it, and receiving Orders from him what to do.

(a) 13 Eliz. cap. 12. (b) Canon 45. (c) Can. 50. (d) Canon. 52. (e) Can. 53.

These were the Canons made in King *James's* Reign, and which relate to Preaching; and they were made at a Time when many excellent Preachers lived, and particularly Mr. *Perkins* and *Reynolds*, and others, who gave the People such a Taste of Religion and Piety, by their frequent and elaborate Sermons, that they kept it always warm in their Minds; and this was carried on with very great Diligence in all that Reign by very learned and eloquent Preachers, and continued in the Reign of his Son and Successor, till the Civil Wars broke in upon the Peace of the Church, and then every Body preached besides Scholars.

I say, learned and eloquent Preachers, tho' 'tis a very difficult Thing to be a good Preacher and a learned Man; for Providence distributes its Gifts in such manner, that they are commonly separated, insomuch, that the famous *Balzac* was not a little surprized when he saw a solid Discourse published by Father *Favre*, a great Preacher.

But 'tis a peculiar Happiness to the *English*-Clergy to have those Faculties mix'd in them; we have some Account of this Matter from the noble * Historian, who tells us, that tho' some of the Clergy presumed to determine Things out of the Verge of their Profession, and in *Ordine ad Spiritualia* they would give unto *Cesar* what he refused to receive; yet if the Sermons of those Times preached in Court were collected and published, the World would receive the best Bulk of Orthodox Divinity, great Learning, convincing Reason, powerful Eloquence, and admirable Devotion, that hath been communicated in any Age since the Apostles, and that there was not one Churchman in any Degree of Favour, of a scandalous Insufficiency in Learning, or of a more scandalous Condition of Life; but most of them eminent for Parts and Knowledge, and of virtuous and unblemished Lives:

Their Sermons were not like so many Flashes of Lightning, but as steady Lights to conduct their Hearers in the Paths of Salvation; and the Excellency of the Preachers did not consist in Shew, but in their real Endeavours to promote the most holy Word of God, in Delivery whereof they felt the same Passions in themselves, which they usually raised in those who heard them:

But he gives a very different Character of other Preachers at that Time; for he tells us, that when the Army saw the Presbyterian-Government was likely to be settled in the Church, *Cromwell* and his Officers preached to their Troops, and the common Soldiers did not only preach amongst themselves, but mounted the Pulpits in all Churches, and preached to the People, who quickly became inspired with the same Spirit, and the Women were likewise Preachers, which, he tells us, made

* Hist. Rob. i Part 60.

as great a Noise and Confusion in all Opinions concerning Religion, as their was in the Civil Government of the State; and no Body was questioned for delivering prophane, heretical or blasphemous Opinions, for that was said to restrain the Spirit. *Hist. Reb. 3 Par. 32.*

As soon as Peace was restored to the Nation, the Church was soon furnished with eminent Preachers, and no Age ever produced a more learned Clergy than at that Time, who, by their Preaching and Writing, may convince the People that they set a Value on true Religion, and who, by their Example and Doctrine, have endeavoured to reclaim the loose and vitious Part of Mankind; and are not only become the Honour of their Function, but have given all unprejudiced Persons a sufficient Demonstration that they have a far greater Regard for their Flocks than their Fleeces.

None of these Ministers came in by purchasing Licenses to Preach, which was done formerly, and therefore the Statute was made, which provides (f) *That if any Person takes a Reward to give a License to a Clergyman to preach more than the just Fee, the Person taking it forfeits 40 l. and the Minister so licensed forfeits 10 l. and is to lose such Living as he shall obtain Seven Years after such License, and the Patron may Present, as if the Clerk was actually dead.*

And that they may quietly perform the Duty, the Law (g) hath taken Care that Preachers shall not be disturbed in the Church, which, if any one shall attempt to do, the Constable or Churchwardens of the Parish may bring the Offender before a Justice of the Peace, who shall commit him to safe Custody, but not to the common Goal; then the Justice who committed him, together with another Justice of the Peace, is within Six Days afterwards to examine the Fact, and if they find Cause, they may commit him to Goal for Three Months, and from thence to the next Quarter-Sessions; at which, upon his Reconciliation, and giving Bond to be of good Behaviour for a Year, he shall be released; but if he persist in his Obstinacy, he shall be committed without Bail till he repents.

And by a late Statute 'tis 20 l. Penalty to disturb a Preacher, as well in a Conventicle as in a Church, but this must be upon a Conviction in Sessions; and in order thereunto the Offender must give a Bond of 50 l. with Sureties for his Appearance there; if he refuse, he must be committed till the next Sessions; the Proof must be by Two Witnesses, upon Oath before one Justice of the Peace.

(f) 31 Eliz. cap. 6. (g) 1 Mariae cap. 3.

Prebend and Prebendary.

THIS is a Member of a Cathedral Church, and some are of Opinion that he is called a Prebendary, a *præbendo auxilium Episcopo*; but I rather think 'tis from that Portion which the Church yields to him out of her Stock, for his Maintenance, which is called *Præbenda*, and is a distinct Benefice, arising from some Lands or Church, and appropriated for the Support of a *Prebendary*.

I grant that my Lord Coke (*b*) tells us, there might be a Chapter before they had any Possessions, from which it may be inferred, that there might be a *Prebendary* before he had any peculiar Maintenance, but whether he was distinguished by that Name before he had any *Prebend*, it doth not appear.

'Tis true, all the Revenue of the Church was formerly in the Bishop, and afterwards he granted certain *Portions* to the Dignitaries, and for this Reason he is of common Right the Patron of most *Prebendaries*.

Some indeed are *Donative* (*i*); as at *Westminster* the Queen collates by *Patent*, and by Virtue thereof the *Prebendary* takes Possession, without Institution or Induction.

Some are in the Gift of Laymen, but in such Case they must present the *Prebendary* to the Bishop, and the Dean and Chapter inducts him, and places him in a Stall in the Cathedral Church, and then he is said to have *locum in choro*.

These *Prebendaries* are likewise distinguished into those which are called Simple and Dignitary.

A *simple Prebendary* is such who hath no Cure, and who hath no more but this Revenue for his Support.

A *Prebendary with Dignity* hath always a Jurisdiction annexed, and for this Reason he is called a Dignitary, and his Jurisdiction is by *Prescription*; as for Instance, a *Prebendary* prescribed for himself, and his Farmers to grant the Office of a Commissary, that he made a Lease of the *Prebend* for Three Lives, and that the Lessee granted this Office with all *Profits, Commodities and Advantages*, &c. to the Plaintiff, that the Defendant claiming a Right under the Dean and Chapter libelled for it in the Arches.

The Court was divided upon the Point in Law, (*k*) whether any Ecclesiastical Jurisdiction passed by this Lease to the Lessee, so that he might make a Commissary to keep Courts, &c. The Objection was, that it was a Power or Trust annexed to the Person of the *Prebendary*, as he was a Spiritual Member, and therefore it could not pass to his Lessee, especially if a Layman; for a Commissary was no more than a Deputy, which the Lessee could not depute.

(*b*) 3 Inst. 75. b. (*i*) 2 Rol. Abr. 356. (*k*) Raim. 88. 1 Lev. 125.

But it was answered, that tho' the Prebendary was a Spiritual Person, yet his Jurisdiction was Temporal, and therefore might pass by those general Words in the Lease, especially if it had usually passed so before ; but I rather think that an Office of Jurisdiction will not pass by general Words, as a Recorder cannot make a *Deputy*, without a Special Grant or Custom to warrant it.

These *Prebendaries* make the *Chapter*, of which the Dean is Chief ; and therefore, when a *Prebendary* dies, the Profits are in the *Dean* and *Chapter* till another is collated, and if afterwards he accepts a *Deanry* (1) his *Prebend* is void by *Cession* ; so if he is made a Bishop, the Queen presents to his *Prebend*.

But the Acceptance of a *Deanry* must be understood to be in the same Church, therefore *Anno* 11. *Ed.* 3. (m) the Bishop of *Durham* having presented a Clerk to a *Prebend* of the Church of *St. Andrew*, and afterwards presented the same Person to a *Deanry* in that Church, it was held that the King should recover the Presentation to this *Prebend*, because one and the same Person cannot possess Two *Prebends* in one and the same Church, which is very true ; but the Reason was not applicable to the Case, viz. That a *Prebend* is void by the Acceptance of a *Deanry* in the same Church, which is likewise true ; but then it must be understood of a *Prebendary*, who is a compleat Member of the *Chapter*, that is, one who hath *locum in choro & suffragium in capitulo* ; for an *Archdeacon* may be either a *Dean* or *Prebend* of that Church where he is *Archdeacon*, because *quatenus* such he hath no Vote in the *Chapter*.

Before the Statute 14 *Car.* 2. a *Layman* (n) might be presented to a *Prebend*, because 'tis a Benefice without Cure, &c. and for that Reason a *Prebendary* (o) and a Parochial Benefice are not incompatible Promotions, for one Man may have both, without any Avoidance of the first.

This is proved by common Experience, besides the (p) Canon which enjoins *Prebendaries* not to absent themselves from their Benefices with Cure for above one Month in a Year, and that they should, amongst themselves, proportion the Times of their Residence in the Cathedrals, so that some of them might be always resident there ; and after the Time appointed by their local Statutes is expired, they are required to go to their Benefices, or one of them to discharge their Duties, and this the Bishop is to see duly performed.

And that *Laymen* were promoted to *Prebends*, we have several Instances ; as *Anno* 2 *Ed.* 6. the Earl of *Heriford* had the Promise of Six, the Lord *Cromwell* was made Dean of *Wells*, and such Ecclesiastical Benefices were conferred on more *Laymen* before that Statute, but none since ; for now, such Per-

(1) 2 Rol. Abr. 343. (m) 11 Ed. 3. B. R. Rot. 21. 2 Rol. Abr. 361. (n) 14 Car. 2. (o) Cro. Eliz. 79. (p) Can. 44.

sons only, who are *Ordained by Episcopal Ordination*, are made capable of all Ecclesiastical Promotions.

And because a Prebend it self is not a Benefice with Cure, &c. therefore a Prebendary is not obliged to read the 39 Articles, but he must subscribe the Declaration, for that is required by the aforesaid Statute, *viz.* As he is a Person in holy Orders, and taking an Ecclesiastical Dignity upon him.

But by the Canon he is obliged to preach in his (q) Cathedral, as often as he is bound by any Law, Custom, or Ordinance; and not only there, but in the Parish-Churches of the Diocess where he is Resident, especially in such Churches from whence the Cathedral receives any Rents; and if he cannot preach himself by reason of Sicknes, he is to substitute one in his Place; and if he neglects to supply his Course, he may be punished by the Bishop.

Lastly, Tho' Prebendaries as such have no Cure of Souls, yet we are told that there is a sacred Charge (r) incumbent upon them in those Cathedrals where they reside, and that a Prebend is a just and necessary Encouragement either for such who, by Age or other Defects, are not fit for a Parochial Cure, and yet may be capable to do eminent Service in the Church.

It may be difficult for some Persons to apprehend what the Sacred Charge is, and what eminent Service a Man can do to the Church, who hath so many Defects that he is not capable of a Parochial Cure.

I admit that it may be a reasonable Support to such Persons, who, by their constant and diligent Labour in their Parishes, have merited such a Preferment, especially if their Maintenance is so small as to stand in need of further Subsistence, and that it should not be employed to enrich any sensual Persons.

Prescription.

THIS refers to a certain Person, House, or Land, and is always Personal, that is, 'tis made in the Name of a single Person and his Predecessors, and all those whose Estate he hath, &c. and in this respect it differs from a Custom which is more general, and therefore is never alledged in any single Person; for 'tis always local, and extends to many Persons, *viz.* to all the Inhabitants of a County, City, Town, Hundred, &c.

The Reformers of the Ecclesiastical Law (a) have defined *Prescription* to be a *Right* established by Time, co-operating with the Law, causing the Negligent to forfeit it, and putting an End to Suits.

This agrees with the Description which *Brañon* made of it long before, who tells us that where a Thing hath been recei-

(q) Can. 43. (r) B. H. R. 2 Pts. 8. (a) Reform. Leg. Eccles. fo. 246.

ved and approved by long Use it obtains the Force of a Law; that a Right may be transferred by a long and peaceable Possession, without any other Title, because all Claims ought to be limited to a certain Time, otherwise there would be no End of Contentions.

The learned Bishop of Worcester hath, with his usual Sagacity, explained this Matter, viz. That *non claime* considered abstractedly from all other Circumstances cannot give any Right, because it may be occasioned either by Ignorance or Fear, that a Right cannot be lost by the Negligence of the Person concerned, unless there is an antecedent Law to make that Neglect a Forfeiture; but that 'tis the common Interest of Mankind there should be some fixed Bounds to all Claims of Right, for otherwise Men would live in a State of War and Confusion; and therefore it hath been always accounted reasonable in this Nation, and agreeable to our Laws, that a Right should be acquired by long and peaceable Possession, I say *peaceable*, because there can be no Prescription where there can be any legal Proof made of an Interruption.

But this must be intended (*b*) where there hath been any Interruption of the Right; for a Discontinuance for Ten Years or longer is no Bar to a Prescription, 'tis only a Suspension for a Time.

Neither is it destroyed by any Alteration (*c*) of the Payment, as instead of Money which had been usually paid, to have paid Tythes for 20 Years past; but if the Prescription is to be discharged of Tythe-Hay in such a Ground, and the Owner converts it into Tillage, the Prescription is gone, and so 'tis by any Alteration which is made to the Prejudice of the Parson.

There are some Prescriptions which are not allowed by the Canons of the Church; as for a Clergyman to prescribe against a Visitation, or for Non-payment of Procurations at that Time; and some are not allowed by the common Law, as for a Layman to prescribe *in non decimando*.

So to pay no Tythes nor any Thing in lieu thereof, (*d*) tho' nothing can be proved to be paid in the Memory of Man, this is not good.

So to pay the Tythes of one Thing in Recompence for the Tythes of another, or to pay no Tythes for Cattel, because he pays Tythe-Corn, or to pay none in one Place, because he pays them in another, or to pay no Tythes, because he hath, Time out of Mind, repaired the Church, these Prescriptions are not good.

So to pay so many Calves and Lambs, and a Penny for every Milch-Cow, in satisfaction of all Tythes of Calves and Lambs,

(*b*) 1 Inst. 114. b. (*c*) 1 Inst. 14. (*d*) 1 Rol. Abr. 649, 8, 51. Plito 16.

and Milch-Kine, and all Barren and other Beasts and Agistments; this last Clause makes all void.

But a Prescription to pay less than a Tenth Part is good; and so 'tis to pay a certain Sum of Money for all his Tythes generally, or for his Tythe-Hay, or for his Tythe-Corn on such a Farm.

So to pay a Penny called an Hearth-Penny (c) in satisfaction for the Tythes of Wood for his Fire, this is good.

The Payment of a Sum of Money, or any other Thing in lieu of Tythes for Six Years, is held a reasonable Time to make a Prescription, which, being a Temporal Thing, is to be tried in the Temporal Courts.

But this is not always so, for where the Prescription is merely Spiritual it shall be tried in the Ecclesiastical Courts; as for instance, if the Churchwardens of the Mother-Church do Tax the Inhabitants of a Chapelry of Ease to repair that Church, and sue for this Tax in the Spiritual Court, and the Defendants suggest that, Time out of Mind, they have repaired their own Chappel, and so ought to be discharged towards the Repair of the other; all this Matter is of Ecclesiastical Cognizance, and therefore it shall be tried in that Court.

Presentation.

BEFORE I treat of a Presentation, I think it may be proper to speak some Thing of the Patron, which word signifies him who hath the Right to present to a Benefice.

Dr. Godolphin tells us 'tis derived a *Pratocinando*, that is, from pleading the Cause, or defending the Rights of the Church, but withal, as improperly as *Mons* is derived a *movendo*; for in this Age some Persons, instead of defending, do prostitute the Church and the Revenues thereof to sale and merchandize.

He who gave the Ground, or who built the Church, or endowed it, had a Right to present a Clerk to that Church; and this was called *Jus Patronatus* by the Canon Law, which is an *Advowson* by our Law: And therefore * *Glanvil* calls the Patron *Advocatus quis advocatus præsenteravit ultimam personam ad Ecclesiam*, &c. And in this respect all Church-Livings here in England were originally donative; and Presentations to Ordinaries, Admissions, Institutions, and Inductions, did not obtain here 'till many Years after the Conquest, all which was done in compliance to the Canons; and this, as † *Mr. Selden* tells us, was about the beginning of the Reign of our King *John*, and then Bishops filled the Churches with Incumbents; yet they afterwards transferred this Power to the Laity to encourage them to build Churches, but this was only a Power of Nomination, and not an absolute Power to dispose the Benefice upon

(c) Moor 910. * Lib. 13. cap. 19. † Hist. Tythes 397.

what Terms they would, for the Bishop was still to see that the Clerk was qualified, and then to admit him; and if the Patron did not nominate one in a limited Time, then the Care did return to the Bishop again, and so it continues at this Day.

But tho' the Patron had Power to nominate another, yet he cannot nominate himself; but he may pray the Ordinary to admit him, and an Admission upon such a Prayer is good.

As to the Presentation it self, 'tis the Act of the Patron, which doth not carry with it the Formality of a Deed, but 'tis in the Nature of a Letter-Missive, by which the Clerk is offered to the Bishop, and 'tis always directed to him; and usually in this form if to the Archbishop:

*Reverendissimo in Christo patri & domino. Dom' Thoma permissione divina Cantuariensi Archiepiscopo * totius Angliæ primati & Metropolitano, ejus ve in absentia vicario in rebus Spiritualibus generali, aut alicui in hac parte sufficientem Auctoritatem habenti, &c.*

If 'tis to any other Bishop, then the form is thus,

Reverendo in Christo patri & domino. Domino Johanni divina permissione Ciceslrensi Episcopo, ejus ve vicario in Spiritualibus generali J. A. Armiger indubitatus Patronus Ecclesiæ Parochialis de H. in Com. S. salutem in domino sempiternam, ad Ecclesiam parochialem de H. pred. vestra diocesos modo per † mortem. J. S. ultimi Incumbentis ibidem jam vacantem & ad meam donationem pleno jure spectantem dilectum mihi in Christo P. S. Clericum, in artibus magistrum, paternitati vestræ presento, humillime supplicans quatenus præfat. P. S. ad dictam Ecclesiam admittere, eumque Rectorem ejusdem Ecclesiæ instituere, cum suis juribus & pertinentiis universis, ceteraque expedire & peragere, qua vestro in hac parte incumbent Officio pastoralis, dignemini cum favore: in cujus rei testimonium hi presentibus Sigillum apposui; Dat. 18 die Octobris Anno Regni, &c.

This Right of Presentation is a Temporal Thing, (r) and therefore it properly belongs to the Temporal Courts to determine who is the true Patron, and at what Time, and when to be void.

'Tis a Right which may be transferred to another by Deed or Will, it may be forfeited by Outlawry, and then the Queen shall Present, which remains good, tho' the Outlawry should be afterwards reversed; but this must be understood where the Advowson was forfeited by the Outlawry, and the Church became Void after that Forfeiture, for in such Case the Presentation is vested in the Crown, as 'tis the Profits of the Advowson; (a) but if the Church was actually void at the Time of the Outlawry, then the Presentation is forfeited as a Chattel, and upon the Reversal of the same, the Party shall be restored to it.

* If to the Archbishop of York, totius must be left out. † Resignationem Cessionem Deprivationem, as the Case is. (r) 2 Rol. Abr. 293. (a) Moor 269. So

So likewise if the Church was * void at the Time of a Grant made of the next Presentation, the Grant it self is void as to that Presentation, because 'tis not then grantable, it being a Thing in Action, but 'tis good for the next Presentation after that.

It may be forfeited likewise by Symony or Recusancy, of which more hereafter; by the Attainder of the Patron, by an Appropriation without a License from the Queen; (b) but the Inheritance in this Case is not forfeited, only the Queen shall have the Right of Presentation in Nature of a Distress, till the Delinquent hath paid a Fine for his Contempt.

It may be forfeited by an Alienation made in Fee of the Advowson it self, by a Grantee for Life of the next Avoidance; (c) for after such an Alienation the Grantor may Present, but then he must enter for a Forfeiture in the Life-time of the Incumbent, (d) for if he neglects it till his Death, and then Presents, this is void, because the Estate of the Grantee for Life was not determined till the Grantor had claimed it as forfeited, which being omitted, the Presentation vests in the Grantee as a Chatrel upon the Death of the Incumbent, and shall not be divested by the Presentation of him in Reversion.

And because there are several Persons who have a Right of Presentation, I shall treat of them distinctly, viz. Of Presentations by *Common Persons*, *Coparceners*, *Joyntenants*, and *Tenants in Common*; by *Corporations*, by *Baron and Feme*, by *Executors*, by *Infants*, by the *Queen*.

By a Common Person.] As to Presentations by Common Persons, 'tis agreed, that all, who have Ability to Purchase or Grant, have likewise an Ability to Present to vacant Benefices; and this may be done by Persons *Excommunicated or Outlawed*, but in such Case the Bishop may refuse the Presentee.

That the Presentation must be within Six Months after the Avoidance, and that a Clergy-man who is Patron cannot Present himself, (e) but may either pray to be admitted by the Bishop, or he may devise the next Presentation to his Executors, and if by such Devise he appoints that they, or either of them shall Present one of their own Number, the Presentation made by the rest is good.

By Coparceners.] Coparceners are but as one Patron in the Law, and therefore they ought to agree in the Presentation of one Person, if they cannot, the eldest shall present alone and the Bishop is bound to admit her Clerk.

But if they should severally present several Clerks, the Bishop is not obliged to award a *Jus Patronatus*, because they present under one Title, and so not like the Case where Two Pa-

* 1 And. 15. Dyer 130. (b) Ploud. 499. (c) 2 Rol. Abr. 353. (d) Jones 391. 2 Rol. Abr. 352. Litt. Rep. 366. (e) 3 Bulst. 43.

sons present by several Titles ; but if the eldest Sister join with another Sister, the Bishop may suffer the Benefice to Lapse, which he cannot do if she presents alone ; and after she hath presented, the next shall have her turn ; and this Privilege doth not only extend to the Issue of the Eldest, if She should die, (f) but likewise to her Husband, if he is (g) Tenant by the Curtesy.

'Tis a Privilege which likewise extends to their Grantees, for if Two Coparceners be of an Advowson, and they severally Grant their Parts to several Men, the Advantage which was between the Partners takes Place between the Grantees ; for the first Presentation shall go to the Grantees of the Eldest, and so to the other ; but 'tis otherwise between Tenants in Common, for if one Presents and the Bishop grants Institution, he hath thereby gain'd the entire Patronage, and the other is put out of Possession, this was the Case of *Harris* * and *Nichols*, which is Reported by Justice *Croke* ; wherein he tells us that the Lord Chief Justice *Anderson* doubted, and he himself Reporting the same Case puts a Quære to it.

But if one Coparcener Usurps upon the Turn of another, that shall not put her to her Writ of Right, but she shall Present upon the next Avoidance, because an Usurpation amongst Coparceners is only for that Turn upon which the Usurpation was made.

Jointenants and Tenants in Common must join likewise in the Presentation, for if either present alone, the Bishop may refuse his Clerk, (h) and so he may the Clerk presented by the major part ; and if the Six Months expire before they agree, he may collate by Lapse.

But if there is a Grant of the next Avoidance to Four, naming them, *Et eorum cuilibet conjunctim & divisim*, (i) in such Case, if one alone presents, 'tis good ; and yet, if there should be such a Severance in the *Habendum* 'tis void ; as if the Grant is to Four, *Habendum eis conjunctim & divisim*.

In *Windsor's* Case there are some Distinctions made, where Persons have a (k) Right of Presentation by Turns, viz. It was in a *Quare Impedit* brought for the Church of *Buscott* in *Berks* ; the Plaintiff *Loveden* had two parts of the Advowson, and the Defendant *Windsor* had one part ; the Plaintiff presented *Parry*, who was Instituted and Inducted, and afterwards deprived by Queen *Mary*, for being a *Protestant* ; and *Loveden* supposing that his second Turn was not satisfied, because of the Deprivation of *Parry* ; he presented one *Dacres*, who was likewise Instituted and Inducted ; and the Defendant *Windsor* supposing that

* Cro. Eliz. 18. 1 And. 63. (g) Co. Litt. 186. 2 Rol. Abr. 346. (h) Co. Litt. 186. (i) Moor 4. 1 And. 2. Bendl. 34. (k) 5 Rep. 102. Moor 559.

both the Turns of the *Plaintiff* were satisfied, presented one *Hitch*, who was also Instituted and Inducted.

Anno 1 Eliz. *Hitch* was deprived, and *Parry* restored; and the Church being void afterwards by his Death, the Question was, Whether by the Institution of *Parry*, tho' he was afterwards deprived, the Incumbency of *Dacres* should be Void? For if so, then *Loveden* had no more than one Turn; and it was adjudged that the *Presentation* of *Dacres* shall not make one Turn, because the Declaratory Sentence of Restitution of *Parry* did absolutely avoid his Deprivation, and he was Incumbent again upon his first Presentation, which was recontinued by that Sentence; and when he died, being the last Presentee of the Plaintiff, he ought to present again, and his Presentation of *Dacres*, during the Life of *Parry*, could not be in his Turn, because *Parry* himself died Incumbent,

It was likewise adjudged in that Case, that if the Clerk or one is Instituted and Inducted, and afterwards deprived for any Cause whatsoever, that shall satisfy his Turn, because the Admission and Institution were only voidable, and not void till Sentence; but when 'tis void *ab initio* 'tis otherwise, as in Case of not reading the 39 Articles.

If there are Two Joyntenants of the next Avoidance, (l) one of them may Present the other, but if he Presents a Stranger the Bishop may refuse him.

So if Three have a Right to Present, and Two of them Present the Third Person; (m) the Bishop cannot refuse him, because he cannot Present himself, but if one alone had presented a Third Person it had been wrong.

If after an Avoidance one should Release all his Right to the other, this doth not extinguish his Title, for when the Church became void, * then the next Avoidance which before was only a Chattel in both, is a thing in Action; and so annexed to the Person that it cannot be Granted or Released, as it might be before the Avoidance.

Corporation presenting] When a Corporation Presents, it must be under their Common Seal, and by the true Name of their Corporation, (n) otherwise 'tis void.

I admit that there is a contrary Judgment, in the Case of the Dean and Chapter of *Norwich*, (o) who were incorporated by the Name of the Dean and Chapter of the Cathedral Church of the Holy Trinity of *Norwich*, *ex fundatione Regis Edwardi Sexti*, which Words were omitted in a Regrant to them by the same King, and yet the Grant was held good, but it was by reason of the Statute of Confirmation, made in the first Year of that King's Reign, (p) which recites that he made several Grants, &c. and for avoiding all Controversies which might

* 1 And. 223. 1 Leon. 167. Cro. Eliz. 173. (l) 1 And. 2. Moor. Dyer 305. 1 Inst. 186. (m) 2 Rol. Abr. 348. (n) 1 Bull. 91. (o) 3 Rep. 73. (p) 1 Ed. 6. cap. 8. happen

happen concerning any of them for want of true naming any Bodies Corporate, it was enacted, That such Grants made, or to be made during his Life, should be good, notwithstanding the misnaming, &c.

By Executors.] If a Man hath a Grant of the next Presentation, and he dies, the Church being full, the Right to Present goes to his Executor; the Law is the same if he dies, the Church being void, and without devising his Right, for the void Turn is a Châttel, and before 'tis actually vested in the Executor, he may Grant it over to another.

But in such Case, if the Testator in his Life-time Presents a Clerk, and dies before he is admitted, and afterwards the Executor Presents another, the Bishop may receive either.

If the same Person is both Patron and Incumbent, and he dies, (q) though the Presentation is thus severed from the Advowson, and vested in the Executor, yet the Heir shall Present, because where Two Titles commence at the same Instant as in this Case, upon the Death of the Incumbent, the Advowson Descends to the Heir, and though the Avoidance is vested in the Executor, yet the Eldest Title shall be preferred.

But if he, who is both Patron and Incumbent, had * devised or given Authority by his Will, to Three Executors, or to either of them to Present such a Person; this Devise had been good, for though the Church becomes void by his Death, and the Will is then to take Effect; and the Presentation is then likewise a Flower fallen (as the Lawyers call it) and a thing in Action, and so not grantable, yet the Devise is not void; because it had an Inception in the Life-time of the Testator, it may be compared to a Lease made upon Condition, that the Lessee shall not alien it in his Life-time, he Devises it to another and dies, this Devise is no Breach of the Condition, because it was only begun, but did not take Effect, whilst he was Living.

But where a Bishop hath a Presentation in Right of his Bishoprick, and dies, his Executor shall not have the void Turn, but the Queen, because the Temporalities are in Her Hands, and She hath a Right to Present upon an Avoidance, during the Seisure, and also upon an Avoidance on the Death of the Bishop.

Husband and Wife.] If a Feme-Covert hath a Right to Present, She cannot do it without Her Husband, for the Presentation must be in both their Names, or he alone may Present during the Coverture.

And so he may after her Death, if he is Tenant by the Courtesy, and if he happen to die after the Avoidance, and before the Church is full, (a) his Executors, and not the Heir

(q) 3 Lev. 47. * 2 Roll. Rep. 214. 3 Bulst. 47. (a) 1 Inst. 29. 4. 38 Edw. 3. 36. Bro. Presentment al' Eglise 18. 21 H. 6. 56. 28 H. 6. 8.

at Law shall Present, because it was vested in him as a Chattel, and therefore it shall go to his Executors.

Presentation by Infants.] A Guardian in Socage cannot Present to a Church, for by the Law he is not to meddle with any thing but for what he may account, (b) which he cannot do for Presentation, because he is to take nothing for it.

But some are of Opinion that he may Present, (c) so long as the Heir is under the Age of 14 Years; but my Lord Coke (d) affirms it for Law, that the Heir shall Present, let him be of what Age he will.

By the Queen.] If the Queen is seized of an Adwowson, in the Right of the Dutchy of Lancaster, and She Presents a Clerk under the Great Seal, 'tis good (e) notwithstanding the Dutchy Seal is wanting; for a Presentation passes no Interest as a Grant doth, 'tis no more than a Recommendation of a Clerk to the Bishop.

'Tis true, She may Present by Her Letters-Patents, and by these Words, *viz. Damus & concedimus*, for this amounts to a Warrant for the Bishop to admit the Clerk.

If a Rector is made a Bishop, the Queen shall Present by Virtue of Her Prerogative, (f) unless She granted a Dispensation to him to hold his Rectory with the Bishoprick, and this must be before his Consecration.

If a Bishop is Patron of a Benefice which is void, and he dies before he Presents, (g) the Queen shall have the Presentation.

So where a Deanry becomes void, whilst the Temporalties of an Archbishop are in Her Hands, She shall Present the new Dean.

If She Presents without any manner of Right, and the Presentation is in this Form, *viz. ad nostram Presentationem sive ex pleno jure sive per lapsum temporis, &c.* (h) this will not amount to an Usurpation, because it expresseth a Right where there is none, but if the Presentation had been general, 'tis otherwise.

But if She hath a real Title, and doth vary from it, (i) as where She hath a Title by Lapse, and She Presents *pleno jure*, 'tis void, and all that follows upon it, because 'tis built upon a wrong Foundation.

Lastly, The Lord Chancellor hath the Privilege to Present to Her Benefices, under the yearly Value of 20*l.* in the First-Fruits-Office.

Presentation by a Recusant.] A Popish Recusant Convict cannot Present during the Time of his Recusancy, but the Chancellor and Scholars of Oxford and Cambridge may do it, (k)

(b) 1 Inst. 17. b. 29. a. (c) 2 Cro. 99. (d) 3 Inst. 156 (e) Moor. 874. (f) 2 Roll. Abr. 343, 344. (g) 2 Roll. Abr. 343. (h) Yel. 7. Cro. Car. 592. Hob. 5. 302. Vaugh. 14. 1 Mod. 254. (i) 2 Cro. 252. 6 Rep. 29. (k) 3 Jac. cap. 5.

in the respective Counties mentioned in the Statute: But this Act was evaded, by granting the Advowson for a Term of Years to a Friend in Trust; but the Queen by Virtue of the Statute might seize Two Parts in Three of the Offender's Estate, and if She seized the Advowson as Part of the Two Parts, 'tis then vested in Her, and the University shall not Present to any Avoidance that shall happen during the Recusancy, because the University hath no real Estate in the Advowson, (1) they have only a Right to Present as the Bishop hath, upon a Lapse; and though the Words of the Statute are, that a Recusant shall be disabled to grant any Avoidance to a Benefice, yet the Grant of an Advowson for Years is not comprehended under those Words, because such a Grantee may accept a Release from the Patron.

By a late Statute 'tis Enacted, (m) That if any Person shall refuse or neglect to repeat and subscribe the Declaration, when it shall be tendered by Two Justices of the Peace, or shall refuse to appear before them for that purpose upon Notice given, he shall have his Name and Place of Abode, certified at the next Quarter-Sessions, and Recorded by the Clerk of the Peace, and shall from that Time be disabled to Present, or to Grant the next Avoidance, as if he had been a Popish Recusant Convict, and that the Universities shall have the Presentation, and all Persons who shall be seized of an Advowson, or of any Right of Presentation in Trust for any Papist, or any one disabled by this Act, shall be disabled likewise to Present; and if such Trustees do not give Notice to the Chancellor of the University, within Three Months after the Avoidance, they forfeit 500 l. to the Universities.

Where a Plea of Recusancy is pleaded, the Defendant must set forth so much of the Act of 23 Eliz. cap. 1. which gives the Justices Power to determine in their Sessions all Offences for not coming to Church; and likewise so much of the Act of 29 Eliz. cap. 6. which recites, That upon an Indictment found against a Recusant, Proclamation shall be made, that he render himself to the Sheriff before the next Assizes, which if he neglects, it shall be a sufficient Conviction: And by the Statute of 3 Jac. aforesaid, by which a Popish Recusant Convict is disabled to Present to a Benefice, he must likewise plead the Record of Conviction, with an *hic in Curia prolatus* and he must not set forth that the Plaintiff did not render himself at the next Assizes, (n) for he might do it before; but a Pardon takes away this Disability.

Revocation of a Presentation.] It hath been a Question whether a Presentation may be expressly and actually revoked, or whether it ought be done *cumulando*, that is, by making a second Presentation, which is in Law a Revocation of the first.

(1) Jones 17. (m) 1 W. c. 26. (n) 3 Lev. 332. 2 Lut. 1100, 1117.

'Tis agreed, that the Queen may actually revoke Her Presentation ; so in the Year Book 44 *Edw. 3. fol. 35.*

'Tis true, She may likewise do it *cumulando*, as where She hath a Right to Present, She first grants it to one and then to another, (*o*) which is in Law a Revocation of the first, without mentioning it; and this She may do after Institution of the first Presentee, because the Church is not full against Her till Induction :

But if either She or Her Presentee should die after Institution, and before Induction, in either of these Cases the Death of the Party is a Revocation in Law of the Presentation ; (*p*) but 'tis otherwise where a Lay Patron Presents, and dies before his Clerk is admitted, for that is no Revocation of his Presentation.

Now, when the Queen actually revokes Her Presentation, if the Person should afterwards get Institution and Induction, without Notice given to the Bishop of the Revocation, 'tis absolutely void, (*q*) for the Revocation is effectual before Notice, that being only to make the Ordinary chargeable as a Disturber, if he should proceed to give Institution afterwards.

The reason why the Death of the Queen before Her Clerk is admitted, shall be a Revocation in Law of Her Presentation is, because She had no Effect of it. The same Reason will hold in the Case of a common Person, but yet if he dies before his Clerk is instituted, 'tis no Revocation, (as hath been before observ'd) because the Presentation is actually gone from him, and so it was from the *Queen*, so that this seems to be an extraordinary Reason.

The next Question is, whether a common Person can actually revoke a Presentation ? Or whether he should not vary *cumulando* ? So that having presented Two Clerks the Ordinary may admit which he will.

My Lord *Rolls* tells us he cannot actually Revoke, and cites a Case in *Dyer* (*r*) to prove it, which must be a Mistake, for there is nothing relating to this Matter, but the Opinions of *Dyer* and *Mounson*, that a common Person cannot revoke his Presentation after Institution and before Induction, which is very true, because upon the very Institution the Church is full as to him.

But certainly he may do it before his Clerk is admitted, (*s*) because a Presentation is no more than a Recommendation of a Person to the Ordinary, in order to be admitted to a Benefice, and carries no Interest with it, as hath been mentioned before.

(*o*) 1 And. 28. 2 Roll. Abr. 354. (*p*) *Dyer* 348. 2 Roll. Abr. 354. (*q*) 2 Roll. Abr. 451. Plito 17. (*r*) *Dyer* 348. (*s*) *Latch*, 254.

Procurations.

SINCE Bishops, by the Common Law, are to visit their Diocesses, in order to enquire into the Manners and Behaviour of the Clergy, both in respect to their Duties, as they are Ministers, and what Care they take to keep the Churches and Parsonage-Houses in Repair, therefore the same Law hath provided, that it should be done at the Charge of those Inferior Clergy who are visited, which is by a certain Tribute called *Procurations*.

This is defined by the Canonists to be *Exhibitio sumptuum necessariorum facta Prælati, qui dioceses peragrando Ecclesias subjectas visitant*; and it was to be provided suitable to the Quality of the Visitors, but with great Moderation and Temperance, *ne juniorum doctrinam rubentibus buccis prædicent*; and from procuring these Entertainments for them and their Attendants, they were called *Procurations*: And the Canons were so strict in this Matter, that Money was forbidden to be given in lieu of Viſtuals, *sub pana maledictionis terranea*, and the Visitor, who received any Money, if he was a Bishop, or above that Degree, was to restore to the Church twice as much as he took from it, and that within a Month after he received it, but if he refused he was liable to an Interdiction *ab ingressu Ecclesie*.

If under the Degree of a Bishop, he was to be suspended *ab Officio & Beneficio*.

But the Bishops in those Days being usually attended with great Equipages at the Time of their Visitations occasioned great Complaints amongst the Clergy, * for, as the Canon takes Notice, they were obliged to sell the Church-Plate to buy Provision for them and their Attendants, and that *longi temporis victum brevis hora consumebat*, therefore by that Canon their Retinue was limited to a certain Number, viz. if an Archbishop was the Visitor he was not to come with above 50, if a Bishop, not to exceed 30, a Cardinal 25, and an Archdeacon 7.

If the Number of the Dishes had been limited as well as their Retinue, it might have been some ease to the Clergy, but the Visitors frequently *Sumptuosas Epulas quærebant*, tho' they were directed only to take a Competency, and that *cum gratiarum actione*, and 20 or 30 Horse being a great Charge to the poor Clergy, (for they might stay a Day and a Night) therefore to remedy this Inconvenience, Pope Boniface VIII. Anno 1295. made a Constitution, that, *Volentibus visitatis & non aliter*, the Visitor might receive Money instead of *Procurations*.

But still the Clergy were oppressed by the exorbitant Demands of the Visitors, for tho' this Canon made it lawful for them to compound for Money instead of Viſtuals, yet the Sum was not limited.

* Concil. Later. Sub. Alex. 3 Anno 1179. Can. 25.

Therefore about 16 Years afterwards a Complaint was made of this Matter in the Council of *Vienna* under Pope *Clement V.* but it was not redressed till 60 Years afterwards, viz. by a Decree made by *Benedict XII.* the Sum was proportioned according to the Quality of the Visitors, and the Circumstances of the Persons visited, but still leaving that at Liberty to pay so much in Money, or in Victuals.

So that it must be a mistake of Sir *Simon Degg*, (a) to affirm, that the Payment of Money was begun by Composition between the Visitors, and the Clergy, by which every one was to pay such a Proportion to them to be discharged of this great Oppression, for it was certainly begun by those Canons, and the *Quantum* was settled by *Benedict XII.* but because the Persons visited had still Power either to pay the Money, or procure the Victuals, 'tis probable the Visitors afterwards compounded with them for Money.

And this voluntary Payment being continued in many Places, did in Time grow into a Custom by which the *Quantum* is now settled and paid at this Day.

That Procurations are due *ratione Visitationis* is without all Question; but there hath been some doubt, whether they are due for that alone: The Reason which is usually given for it is, that Procurations being only an Exhibition to the Visitor for his Travelling-Charges, when he ceases to Visit, nothing is due, and that when religious Persons were dereigned, they were not subject to any Visitation, and by consequence no Procuration was due.

If this is true, then *Archdeacons* can have no Right to demand Procurations in that Year wherein the Bishop Visits, so that *Cessante causa cessat effectus.*

But this doth not hold in Procurations, the Payment whereof may be resembled to the Case of Lands, held by the Payment of a Rent *pro warda Castri*, tho' the Castle is demolished or decay'd, yet the Rent must be paid.

In like manner, tho' Parsonages impropriate are now made Lay-Fees, and are in the Hands of Persons not visitable, yet the Money which hath been anciently paid by Composition between the Visitors and the Clergy ought still to be paid.

This Payment is now become a certain and settled Revenue of the Archdeacon, and 'tis in effect his Subsistence, 'tis valued to him in the Queen's Books, for which he pays Tenths; and in several Grants from the Crown of impropriate Rectories, these Procurations are still left as a charge upon the Impropiator.

I agree, that some Canons have been formerly made in this Kingdom, prohibiting Procurations to be paid to *Archdeacons* if they did not personally Visit, and that they should not presume to take any Fees for not visiting.

But Custom hath obtained against those Canons, for 'tis not reasonable that an *Archdeacon* should be deprived of this Profit for his submitting to the Bishop in his triennial Visitation, this would be to punish him for his Obedience to the Inhibition of his Diocesan.

Therefore these Fees, having been for a long Time enjoy'd and paid by the general Consent of the People to the Archdeacons themselves, when they do not visit in Person, are justly due to them; and at such Times they usually make enquiry into the Circumstances of each Parish, either by themselves or by their Officials, and this is done at Two Chapters held about *Easter* and *Michaelmas*, and 'tis called a Visitation, for which these Fees are due to them as well when they do not personally Visit, as when they do.

The next Thing I shall mention is, where these *Procurations* are to be recovered; and as to that Matter, it would be necessary to consider how the Law stood before the Act of 34 H. 8. cap. 19. and what Alteration was made by that Statute.

And first, it seems very plain, that before the making that Act, Procurations were recoverable in the Spiritual Court, and not elsewhere, unless where the Plaintiff claimed them by Prescription, and then it was triable at Common Law, tho' since it hath been doubted whether a (b) Bill in the Exchequer might not be proper in such Case; but that must be intended where they have not been paid within Time of Memory, and this is by Virtue of the *Saving* in the Statute of 31 H. 8. cap. 13. by which the Monasteries are given to the Crown, and the Lands belonging to them were ordered to be under the Government of the Court of Augmentations, *Saving to all Persons and their Heirs such Right, &c. Proxies and other Profiss, which they, or any of them may have, or might or may claim, as if that Act had not been made.*

So that if an Ecclesiastical Person hath a Right to receive Procurations, tho' they have not been paid since the making that Statute, yet his Right is saved, and he may recover it by a Bill in the Exchequer; but where Procurations have been paid since the Statute, it will be presumed that they were paid before and at the Time it was made, by which 'tis enacted, *That Procurations which were due, and had been formerly paid by religious Houses then dissolved, should still be paid by the Occupiers of the same Lands to such Ecclesiastical Persons who were seised thereof within Ten Years before the Dissolution; and if upon Suits in the Spiritual Court for the same, the Defendants shall be convicted, they were to answer the Value in Damages together with Costs, and that the Plaintiff should recover the like at Common Law when the Cause is determinable there.*

(b) Hardres 180.

There is a Proviso in this last Act, *viz.* *That if the King had demised any of these Lands for Life or Years with a Covenant to discharge the Lessee from the Payment of Procurations, that the Party claiming them shall sue in the Court of Augmentations and not elsewhere*, which Court is now annexed to the Exchequer.

But this Proviso doth not extend where any Lands were granted by him in Fee, but only to such Cases where the King had granted any particular Estates thereof, and therefore a Prohibition (c) was denied to stay an Excommunication for not paying Procurations upon suggesting this Statute, and that the Party ought to be sued in the Exchequer.

The Reformers of the Ecclesiastical Law (d) would have the Visitors Sequester the Profits of the Living in Case of Neglect or Refusal to pay Procurations, and to proceed against them by Ecclesiastical Censures, but the usual Remedy is in the Spiritual Court, unless it is claimed by Prescription.

And therefore where an Archdeacon libelled in the Spiritual Court, for Procurations, setting forth that for 10, 20, 30, and 40 Years last past there was due, and paid 6s. yearly for the same by the present Incumbent, and his Predecessors, Parsons of *H.* the Court would not grant a Prohibition, tho' the Prescription was denied; because a Prescription in the Ecclesiastical Court may have a different Commencement from what it hath at Common Law, and Procurations are payable of Common Right as Tythes are.

Prohibition.

I Shall treat of this Subject only as it relates to the Spiritual Court, to which this Writ of Prohibition is directed, upon a Suggestion that it doth not belong to that Court, but to the Courts of Law to take Cognizance of the Matter.

It may be necessary in this Place to mention the Contests which have formerly been made between those Courts; for in the Time of *H. 3.* the Prelates made several Canons directly against the Laws of the Land, (e) and my Lord Coke tells us what they were.

That they might try the Bounds of Parishes, the Right of Patronage, and of Tythes, and that no manner of Possessions which were held of the Church should be try'd in the Temporal Courts, and many more in substance (as he calls it) were then made against the *ancient and just Writs of Prohibition*; and to enforce Obedience to those Canons, the King himself was admonished to observe them, or an Interdict was to be put upon his Lands and Revenues, his Subjects likewise were to comply upon pain of Excommunication.

(c) Hardres 388. (d) Fol. 126. (e) 2 Inst. 599.

But notwithstanding these Admonitions, and though all the great Officers of State, and many of the Judges were then Clergymen, yet they proceeded according to the Common Law, and with great Difficulty kept the Spiritual Courts within their proper Jurisdiction, and this was done by granting Prohibitions to those Courts where they encroached upon the Courts of Law.

This occasioned the Clergy to exhibit several Articles to the Parliament, *Anno 51 H. 3.* which were called *Articuli Cleri*, and which are since lost.

But *Anno 9 Ed. 2.* the Archbishop of *Canterbury*, in the Name of himself, and all the Clergy, exhibited 16 Articles to the Parliament which were likewise called *Articuli Cleri*.

The First and Fifth of those Articles concern Prohibitions, and the Answers which were then enacted by the Parliament were as follow ;

That no Prohibition shall go where the Suit was for Tythes merely as such, but if a Parson should sell his Tythes, and then sue for the Money in the Spiritual Court, a Prohibition shall be granted, because by the Suit the Tythes which were before Spiritual are turned into a Chattel.

So if the Tythes are once set out, (f) and afterwards carried away by the Occupier of the Land ; if the Parson will sue for them in the Spiritual Court, a Prohibition shall go, because by the Severance from the Nine Parts they are become a Chattel, and he may maintain an Action of Trespass for this Wrong ; but Justice *Croke*, (g) who reports the same Case, tells us, the Court was divided, and the better Opinion was, that the Person who set out the Tythes might be sued in the Spiritual Court for carrying them away, but not a Stranger.

The other Article was, that no Prohibition shall be granted where the Tythe is demanded out of a Mill newly erected, of which I shall treat more at large in another Place.

I only mention these Things to shew that in former Times Prohibitions were granted, to keep the Spiritual Courts within their due Bounds, which is plainly implied by the Negative Answers of that Parliament.

It would be a tedious Business to give the Reader an Account of the frequent Complaints of the Clergy, almost in every King's Reign, against these Prohibitions, especially before the Reformation ; I shall therefore confine my self to what was done since.

It seems it was a common Thing, before that Time, to make unnecessary Delays in Suits for Tythes, by obtaining frequent Prohibitions to the Ecclesiastical Courts.

Therefore *Anno 2 & 3 Ed. 6. cap. 13.* a Statute was made to prevent this Inconveniency, in which there is this Clause, viz.

(f) 2 Rol. Abr. 286. Plito. 41. (g) Cro. Eliz. 607, 844.

Before a Prohibition shall be granted, the Plaintiff therein shall bring a true Copy of the Libel concerning the Suit, subscribed by the Hand of the Party, and there-under shall be written the Suggestion, upon which the Prohibition is demanded; and if such Suggestion is not proved by Two sufficient Witnesses within Six Months next after the Prohibition granted, a Consultation shall be granted, and double Costs and Damages awarded by the Courts of Law, which may be recovered by Action of Debt.

Now, the Reason why a true Copy of the Libel should be produced, together with the Suggestion, is, that it may appear to the Judges whether a Prohibition ought to be granted upon such a Suggestion, or whether there is any material Variance between that and the Libel; as for Instance, if the Libel is for the Tythes, the Defendant may suggest a *Modus*, which must agree with the Libel, because 'tis grounded upon it; but if he suggest that the Land was discharged of Tythes in the Hands of an Abbot or Prior, (h) and so ought still to be discharged, and that the Parson libelled against him for Forty Fleeces of Wool, and the Defendant pleaded, that he sued him for 400 Fleeces, this is not a material Variance, because the Plaintiff prescribed in *non Decimando*, and so had wholly ousted the Spiritual Court of any Jurisdiction.

As to the Proof of the Suggestion, it need not be positive, for common Fame is * sufficient; neither is it necessary to prove it strictly in every Part, to avoid both a Consultation and double Costs; as for Instance, if the Suggestion is, that the † Parson had 20 Acres of Pasture, and 10 Acres of Wood, in Satisfaction of the Tythes, for which the Suit was brought, and the Proof is, that he had the 20 Acres of Pasture, but not the Wood, yet a Consultation shall not be awarded, because there was sufficient Proof against the Parson for taking Tythes in Kind; so, if the Custom is alledged to pay †† 4 d. for every Acre, in discharge of Tythes, and the Verdict finds 3 d. no Consultation shall be granted; the Law is the same, if the *Modus* is to pay ‖ 20 l. and the Proof is to pay 40 l. because 'tis but to entitle the Court to a Jurisdiction, and there is enough found to bar the Parson from the Tythes in *Specie*: But if the Suggestion had been to pay 20 s. in discharge of Tythes of Two *Farmes*, and the Proof is, that the Tenants of those *Farmes* paid 40 s. in discharge of Tythes of One *Farm*; this is such a Variance, that a Consultation shall be granted.

So, where a Custom was alledged to pay Money in discharge of the Tythes of One *Farm*, and the Libel was for * Offerings as well as for Tythes, a Consultation was awarded as to the Offerings.

(h) Yelv. 79. * Cro. Eliz. 228. Lit. Rep. 155. † Moor 911. Cro. Eliz. 307. 736, 819. †† Hetley 111. ‖ Hetley 100. * Sid. 251.

But there is a Difference between a Prescription set forth in a † Suggestion, and a Prescription alledged in a Plea to an Original Action ; for in the last Case, if the Defendant prescribes for Two Things, and fails in the Proof of one, 'tis void for the whole, because it was alledged in Defence of a Title ; but 'tis otherwise in a Suggestion to have a Prohibition, because 'tis only to give the Temporal Court Jurisdiction, which is sufficiently done by the Proof of one Thing.

But, notwithstanding this Statute, I find that the Clergy still complained against granting Prohibitions, for in *Michaelmas-Term Anno 3 Jac. (i)* Archbishop *Bancroft*, in the Name of all of them, exhibited certain Articles to that King in Council against the Judges, for some Abuse in granting the same, which they desired might be reformed, suggesting that many Prohibitions were unduly obtained, and they were so exact in the Computation, that they affirmed from the Beginning of Queen *Elizabeth's* Reign to *Michaelmas-Term 3 Jac.* there had been 560 Prohibitions granted to the Court of Arches, and that not one in Ten was rightly awarded ; but they were so cautious as not to name One in particular.

Then they suggested, that since both the Spiritual and Temporal Jurisdiction were become united in the Crown, it might be proper for the King in Council to rectify what was amiss in either, and not leave it to the Determination of the Courts in *Westminster-Hall*.

But the Judges answered, that Prohibitions were granted, in order to keep the Spiritual Courts within their due Limits, and that they should not exceed that Jurisdiction which properly belonged to them, and that what was warranted by the Law in such Cases could not be altered but by the Parliament ; and they had likewise computed all the Prohibitions granted by all the Courts in *Westminster-Hall* in that King's Reign, which amounted to 313, and no more ; and that 180 of them were *de modo decimandi*, and the rest were grounded upon Unity of Possession, or where the Libel was for Tythes of Trees of 20 Years growth and upwards, for Tythes of Barren and Heath Lands, and concerning the Boundaries and Extents of Parishes.

Then they objected against the Form of Prohibitions in general, because it imported, that the Spiritual Courts were not *a foro Regio*, and that the Proceedings therein were *contra coronam & dignitatem Regis* ; and tho' it was a received Opinion that the Ecclesiastical Court was *aliud forum* from the King's Courts, when their Jurisdictions were distinct, yet it was very improper to affirm it so to be now, when both those Jurisdictions were united in the Crown.

† Yelv. 55. (i) 2 Inst. 601.

To this Objection the Judges likewise answered, that both these Jurisdictions were always *de jure* in the Kings of this Realm, tho' one of them was frequently usurped by the See of Rome; that the Forms of Prohibitions could not be altered but by the Parliament, and that it was *contra coronam Regis* for the Spiritual Court to usurp on the Temporal Jurisdiction, because it was to draw the People and their Causes *ad aliud Examen*, than where by the Law they ought to be tried.

'Tis no wonder that the Archbishop before-mentioned should exhibit such Articles to the King, and to the Lords of his Privy-Council of Abuses in granting Prohibitions, when he told him that it was clear in Divinity, that the King had Authority to take any Ecclesiastical Causes from the Determination of the proper Judges, and to determine them himself; when my Lord Coke told him, at the same Time, that the King in his own Person could not judge any Cause whatsoever, neither could the Lords of the Privy-Council direct the Judges in the Administration of Justice, or set Bounds to the Jurisdiction of any Court of Judicature.

It will appear by the Answers what the rest of the Objections were, which Answers, being the Resolutions of all the Judges of England, are of great Authority in the Law, and therefore I will shew what they were, and what Proceedings have been in like Cases ever since.

They all held that Prohibitions might be granted even after a Sentence in the Spiritual Court, for tho' by the Proceedings there, the Jurisdiction might be affirmed, yet it was a Mistake of that Court to hold Plea, even at the Instance of the Party, in such Matters, which did properly belong to the Temporal Courts; so it was the Folly of the Plaintiff to proceed there in any Cause not proper for their Judicature, and therefore the Proceedings in such Cases are *coram non judice*, and Prohibitions may be granted at any Time, as well after Sentence as before; but if the Defendant will confess the Allegation in the Libel, and thereupon Sentence should be given, then 'tis too late to move for a Prohibition, upon suggesting any Matter contrary to his Plea; for, tho' his Confession cannot give any Jurisdiction where the Court had none before; yet this being merely for Vexation and delay of Justice, (k) a Prohibition will not be granted, unless he proves his Suggestion to be true.

'Tis true, Prohibitions ought not to be granted upon any frivolous Suggestion, which the Prelates objected had been too often done; as for Instance, there was a Libel for Tythes, the Defendant suggested that he was discharged by the Parson, upon giving him a Cup of butter'd Ale, which cured him of a Cold, and upon this Suggestion he obtained a Prohibition; but they do not tell us in what Court, or in what Term, nei-

(k) 12 Rep. 77. Noy 70.

ther did they produce the Record ; it was certainly a very ridiculous Agreement, if any such was made, and it could never be admitted a Consideration to discharge the Defendant from the Payment of Tythes.

But Prohibitions may be granted upon a Suggestion of some Collateral Matter, which doth not appear in the Libel it self, as if the Suit is for Tythes of *Sylva Cædua*, the Defendant may suggest, that the Trees were more than 20 Years growth ; so if the Suit is for Tythes in Kind, (l) he may suggest that the Place is not within the Limits of the Parish.

On a Collateral Suggestion.

[One Witness.] Prohibitions have been frequently denied in Causes which are proper for the Jurisdiction of Spiritual Courts, upon a Suggestion that those Courts refused the Proof of One Witness, so is *Noy* 12. and Five Years after that Resolution the Defendant was sued for Tythes, and suggested (m) that he had a Lease of them, which the Spiritual Court would not allow, because he had but one Witness to prove it ; but he could not have a Prohibition, for that Court having Cognizance of the original Matter, such Suggestions had been usually made for Delay ; but if he had pleaded the Lease, (n) and offered to prove it by One Witness, and the Court had refused that Proof, in such Case a Prohibition would have been granted.

It hath been likewise denied where the (o) Suit was for a Legacy, and the Payment was proved by One Witness.

But the latter Authorities are otherwise ; for if a Defendant pleads a Release of the Legacy, and proves it by One Witness, a Prohibition shall be granted, if the Spiritual Court should refuse such Proof, because at Common Law such Proof is good (p) even against a Record ; for if there is a Judgment or Statute against a Man, he may prove the Payment of the Money by One Witness, and that is admitted to be a very good Proof, and so it is to prove the Hand of a Witness (q) who is dead by one Witness living.

As for Legacies, this Distinction hath been made, that where it issues out of a Chattel (r) no Prohibition shall go to a Suit for such a Legacy ; but if it issue out of Lands, a Prohibition will be granted, because the Spiritual Courts have no Jurisdiction of Lands.

It has been likewise held that 'tis not properly a Legacy, (s) where Lands are appointed to be sold by Executors, and the Money to be divided ; so that if a Suit is for any part of it, a Prohibition will be granted.

(l) 2 Rol. Abr. 282. (m) 1 Cro. 269. 12 Rep. 67. (n) 2 Rol. Abr. 302. Hob. 247. Yelv. 92. (o) Het. 87. (p) Hob. 188. (q) Hob. 247. (r) 2 Rol. Abr. 234. (s) Hob. 265.

Quare Impedit.

THIS is a Writ which lies for him who is seised of an Advowson, and is disturbed in the Right of *Presemation*; and because 'tis now become the usual Remedy in such Case, I shall give a short Account,

1. Of the Writ it self.
2. Who may bring it, and who not.
3. Where it must be brought, and the Form of the Declaration.
4. Of what Things it lies.
5. Where it shall abate, where not.
6. Against whom it may be brought.
7. Of the Defendant's Pleas.
8. Of the Judgment in a *Quare Impedit*, &c.
9. Of Writs of Error on such a Judgment.

1. And first, as to the Writ, 'tis certainly very ancient, and my Lord Coke was so far in the Right to tell us, that it was more ancient than the Time of Ed. 1. (a) tho' he was in the wrong in citing *Glamvil* to prove it; (b) 'tis true, he wrote in the Reign of H. 2. but the *Places* cited in the Margent of the second Institutes do not relate to a *Quare Impedit*, but to an Assize de ultima *Presentatione*; for that was the usual Remedy in those Days to recover *Presentations*; and the Reason is plain, because an Assize was *festinum remedium*, for the Tenant ought to appear upon the Summons; if he failed, there was a Resummons, upon which there could be no Essoign, and if he still failed to Appear, the Assize was then taken by Default.

If he did appear upon the Summons, he could not delay the Demandant; 'tis true, he might take Exceptions, either to the Writ, or to the Return, but those were soon determined; he might likewise pray a Day to plead; and if the Court gave him that Liberty, then the Jury was to Appear upon a new Process, and in the mean Time Six of them were to view the Church, that they might put the Demandant into Possession if he recovered.

But there were some Inconveniencies in this way of Proceeding, for an Assize would not lie of a *Prebend*, because by the Form of the Writ the Jurors were required to view the Church, and therefore in Reverence to the Cathedrals, where *Prebends* are, this Writ would not lie.

Neither could it be brought by the Demandant but where he or his Ancestors had presented, nor by Coparceners, because of the Privy which is between them, for that is contrary to the Form of the Writ, which must always be brought against him *qui advocacionem deforceat*, (c) and he who brings it must have

(a) 2 Inst. 355. (b) Lib. 13. cap. 20, 21. (c) 2 Rol. Abr. 381, the

the same Estate which he had when he made the last Presentation, for if Lessee for 40 Years presented last, and afterwards his Estate became enlarged for his Life, and then the Church had been void, he could not have an Affize *de ultima Presentatione*, because he had another Estate.

But in all these Cases a *Quare Impedit* would lie, tho' we rarely meet with any till after the Statute of * *Marlbrige*, because at Common Law the Proceedings in it were very tedious, viz. by Summons, Attachment and Distress infinite; and this was found to be very inconvenient to Patrons, by reason of the Lapse which might easily incur by the long Formalities in such Proceedings, but by that Statute it was provided, that if the Defendant doth not Appear upon the grand Distress, (that is, upon a Writ directed to the Sheriff, commanding him to Distress the Defendant *per omnes terras & catalla sua, &c. Et quod habeat corpus, &c.*) then Judgment should be given for the Plaintiff, and a Writ awarded to the Bishop to admit his Clerk, and this is the Course at this Time.

About 18 Years after this Statute was made, we have an account of a *Quare Impedit* brought by *Edw. 1.* against the Bishop of *Litchfield*; (d) and because 'tis the first which is mentioned in our Books, 'tis probable that might be the Reason why my Lord Coke tells us, that the Writ was as ancient as the Reign of *Ed. 1.*

It doth not appear in what Year of that King's Reign it was brought, but it must be after his 13th Year, because the Judgment was, that the King should recover his *Presentation*, and have a Writ to the Bishop to admit his Clerk, and that he should recover Damages according to the Statute, which must be this Statute of *W. 2.* which was made in that Year.

But be it when it will it seems the Reporter was mistaken in the Law, that the King should recover Damages; for, before that Statute, the Plaintiff in a *Quare Impedit* could recover no Damages, because it look'd like a Profit which favoured of Simony; and even after that Statute the King could not recover Damages, for he was not comprehended in that Clause by which Damages were given, viz. *That if the True Patron is disturbed, and he brings a Quare Impedit, and pending the Suit the Bishop should present by Lapse, in such Case if the Plaintiff recovers he shall have Damages to Two Years Value of the Church, &c.* and there is a Judicial Writ in the Register, to be directed to the Sheriff to impanel a Jury to inquire into the Value, &c. but if he did not lose his Presentation, the Plaintiff in such Case was to recover but † half a Year's Value, &c.

Now the King could not be intended by this Clause, (f) because he can never lose his Presentation.

* Anno 52. Hen. 3. (d) Fitzh. Abr. Tit. *Quare Impedit* 181. † Co. Ent. 507. (f) 6 Rep. 51. Dyer 326. 24 f.

But to return, my Lord Coke tells us, (g) that Anno 8 E. 1. there were Three Writs de *advocationibus Ecclesiarum*.

1. A Writ of Right of Advowson.
2. A *Quare Impedit*.
3. De *ultima Presentatione*.

A Writ of Right of Advowson is, where one hath an Advowson in Fee, and suffers a Stranger to Present a Clerk, who is afterwards Instituted and Inducted by this Writ; he might recover his Right again, but a Purchaser could not have this Writ without alledging a Presentation in his own Time, and so must the Demandant in an Affize de *ultima presentatione*, therefore a *Quare Impedit* was provided to remedy this Inconveniency, for in such an Action the Presentation may be alledged in him of whom the Purchase was made.

There was another Inconveniency in the Cases before-mentioned, (b) for the Demandant in a Writ of Right of Advowson could recover only the Inheritance, and not the Presentation; he could not remove the Incumbent, for he was not so much as named in the Writ, he was to be at Peace whilst the Parties were contending for the Right; and the reason was because, he might the better intend the Cure committed to his Charge.

Besides, it was presumed, that the Bishop, who had the Care of the whole Diocess, would do right to every Patron, and not admit any Clerk without just Cause.

This was likewise remedied by the Statute of W. 2. and by the *Quare Impedit*, (i) so as it was brought within Six Months after the Institution of the Clerk, for upon a Recovery in such Case he shall be removed.

And 'tis to be observed, that the Bishop and Incumbent are now usually named in the *Quare Impedit*; the one to prevent a Lapse, which might otherwise devolve on him *pendente lite*, the other that he might be made a (k) Party to the Suit, and so be removed by a Judgment obtained against him, without a *Scire facias* to shew Cause why he should not.

But the sure way to prevent a Presentation to take effect *pendente lite*, is to serve the Bishop with the Writ *ne admittas*, &c. and if he should afterwards admit any Clerk, and the Plaintiff should recover, he may have a *Quare incumbavit*, &c. against the Bishop, and shall remove him who came in *pendente lite*, let it be by what Title it will.

[Who may bring it.] (2.) In the next Place I shall shew who may bring a *Quare Impedit*, and who not.

But before I proceed upon this Matter it may be necessary to inform the Reader that there must be a Disturbance to maintain this Action, and that the effect of it is to gain the Presen-

(g) 2 Inst. 355. (b) 6 Rep. 50. (i) W. 2. cap. 5. Anno 13 Ed. 1. (k) 2 Cro. 92.

tation, and therefore a Man cannot have Two Suits for the same Thing; for 'tis the Nature of this Action to be final, either upon a Discontinuance or a Nonsuit, (l) but he may have as many as he will against several Persons.

The Grantee of the next Avoidance may maintain a *Quare Impedit*, (m) against the Patron.

The Husband may have it alone where the Church of his Wife becomes void, (n) during the Coverture; 'tis true Justice.

* Berkley was of another Opinion, and he made this distinction, that where they Sue for a Personal Wrong, they need not join, but where they have a joint Interest, as (he said) they had in a *Quare Impedit*, there they must join.

But the better Opinion is, that the Husband hath an Interest alone, tho' it arises out of the Right of his Wife, because the Presentation which is to be recovered is no more than a || Chattel, which is vested in the Husband by the Intermarriage; and to shew that it is an Interest vested in him, it hath been held, that if the Church become void, and then he dies, his Executors shall have the Presentation; which made the Lord Chief Justice *Anderfon* question whether, in † *Specott's Case*, as 'tis reported by Mr. *Goldsborough*, the Action was well brought by Husband and Wife, or whether it ought to be brought by the Husband alone without the Wife; tho' he doubted of the Law, whether the Presentation shall go to his Executors as above mentioned.

And as the Grantee of the next Avoidance may have it, so may his Executors (o) for any Disturbance in the Life-time of the Testator, and the Damages which they recover shall be Assets in their Hands; and this is within the Equity of the Statute of 4 *Edw. 3. cap. 7. (p)* which gives Actions of Trespass to the Executor, for a Trespass done to the Testator.

If a Man builds a Church, and is disturbed in the Presentation, (q) he may have a *Quare Impedit*, without alledging a Presentation by any one, (r) for that makes no Title.

But generally, he, who will maintain this Action, must either alledge a Presentation in himself, or in him under whom he Claims; and if there are distinct Patrons and Incumbents, the *Quare Impedit* must be *presentare ad medietatem Ecclesie*, but in such Case it may also be *presentare ad Ecclesiam*, (s) because the half is but as one Church to him.

So where there are distinct Portions of an Advowson in one and the same Church, as where one hath the first Portion, and another the second, &c. he who is disturbed may have a *Quare*

(l) Hob. 137. 7 Rep. 27. (m) 2 Roll. Abr. 375. (n) 1 Inst. 351. * March 47. || Het. 159 Litt. Rep. 274. † 5 Rep. 57. Goulds. 35. 3 Leon. 199. (o) Owen 131. Cro. Eliz. 811. (p) 1 And. 242. (q) Vaugh. 57. (r) 2 And. 49. (s) 10 Rep. 136. Dyer 79. b. 5 Rep. 102

Impedit presentare to such a Part, (t) but he must declare that he was seized of the Advowson of that Part, and not alledge that he was seized generally, for, if he doth, the Action shall abate.

But where there is but one Incumbent, tho' several Persons have a Right to the Advowson, and to Present by Turns, yet the *Quare Impedit* shall not be *presentare ad medietatem*, (u) or to such a Part, but *ad Ecclesiam* generally.

And 'tis to be observed, that 'tis not always necessary that the Patron should be named in this Writ, but only in such Cases where he would be divested of his Interest or Estate by the Judgment, for the * Queen may bring a *Quare Impedit* against the Incumbent, who came in by Symony without naming the Patron.

[Who may not.] It cannot be brought pending another *Quare Impedit* against the same Defendant, and for the same Avoidance.

If a Bishop collates wrongfully, as for Instance, upon a Deprivation, without giving the Patron Notice of it, and then the Patron grants the Advowson to another, this Grantee cannot have a *Quare Impedit* (x) against the Bishop and his Incumbent, because 'it was a Thing in Action which the Patron had destroyed by this Grant.

Where it may be brought, and of the form of the Declaration.

It must be brought in that County where the Church is, but for an Advowson in *Wales* the Writ must be brought in the next *English* County, that is, as my Lord *Vaughan* tells us, (y) when the Church is within the *Marches of Wales*, because the Lords *Marchers* could not write to the Bishops of *Wales*, which the Judges in their Circuits might do, where the Churches were within the ancient Shires belonging to the Principality of *Wales*.

As to the Declaration, 'tis not sufficient for the Plaintiff to alledge, (z) that he, or such a Person, from whom he Claims, were seized of the Advowson of the Church, but he must alledge a Presentation made by one of them, for, if not, the Defendant may Demur to the Declaration, except where a Man, by the King's License, makes a Church Parochial, and appoints it to be presentable, there if he is disturbed he may have a *Quare Impedit*, without alledging a Presentation in any Person, because of the Necessity of the Thing.

Now, the reason why a Presentation must be alledged in the Plaintiff is, because in its Nature 'tis Indifferent and Militant, as my Lord *Vaughan* calls it, and it may be annexed to such a Title, which may prove the Defendant to have a Right

(t) 2 And. 23. (u) 10 Rep. 136. 1 Inst. 18. a. * 2 Lut. 1089.
(x) Cro. Eliz. 811. Owen 131. (y) Vaugh. 410, 411. (z) Vaugh. 57.

to the next Avoidance; therefore the Plaintiff must joyn the last Presentation to his own Title, by which it may appear that he hath a Right to Present now as well as then.

So likewise the Defendant must alledge a * Presentation in himself, or in those from whom he Claims; because in this Action both Plaintiff and Defendant are Actors; the Plaintiff must also shew a † Disturbance before the Writ brought, otherwise it shall abate.

Of what things it lies.

Next to the Declaration, it may be proper to give some Account of what Things it lies; as for Instance, it lies of a Donative, and in such Case the Plaintiff must declare (a) *quod permittas eum presentare ad Ecclesiam*.

It lies for a Disturbance to Present to a free Chappel, which the Plaintiff hath by a Grant from the King, (b) if the Sheriff will not put him in Possession; but in this Case, and likewise for a Disturbance to Present to any other Chapel, the Writ must be (c) *presentare ad Capellam*.

If 'tis in the Case of a Prebend, it must be brought in that County where the Cathedral is, (d) and it must be *presentare ad Prebendam*, (e) if of a Vicaridge it must be *presentare ad Vicariam*.

It lies for a Deanry or Archdeaconry, (f) and generally for any Disturbance to Present upon the Avoidance of any Church.

And because of that Prejudice which might incur on Patrons by reason of the Lapse, therefore the Courts at Westminster, even before the Statute of Jeofails, were always very cautious not to abate this Writ, either for false Latin or for want of Form; for tho' the Party might have a new Writ, yet if not brought within Six Months from the Avoidance, the Church would Lapse to the Bishop.

Thus where the (g) Adverb *Ad* was left out, viz. *que donationem suam*, instead of *ad donationem suam spectat*, this was amended.

So where it was *presentare ad Ecclesiam*, (h) when the Title was to present to a Vicaridge it was amended, for *Vicaria est Ecclesia*; and so it was generally in any other Case, where it appears that the Misprision of the Clerk was the occasion of the Fault.

If the Plaintiff, who was the Son and Heir of an Earl, should have that Dignity by Descent, pending the Writ, it shall not abate, because it was by the Act of God.

* Vaugh. 7, 8, 17. † Hob. 199. (a) Co. Lit. 244. 2 Roll. Abr. 380. (b) 2 Roll. Abr. 336. (c) 2 Roll. Abr. 380. (d) Dyer 194. (e) Dyer 339. (f) Cro. Eliz. 141. Owen 99. 2 Lut. 1. (g) Cro. Eliz. 119. (h) 1 Roll. Rep. 237. Cro. Car. 74.

It shall not abate by the Death of one Coparcener or Joyn-tenant, where they are either Plaintiffs or Defendants, nor by the Release of one of them to the Incumbent of all Actions concerning the Presentation, but it shall be a bar to him who gave the Release, (i) and he shall be summoned and severed, and the other may proceed.

The Death of the Patron pending the Writ doth not abate it, that is, if a *Quare Impedit* is brought against the Bishop, Patron and Incumbent, as 'tis usual; but in such Case if Judgment should be given against the Patron 'tis erroneous, (k) for it ought to be given against the other Two, and not against the dead Man.

So if the Incumbent should die pending the Writ, and the Disturber should present again and die, a *Quare Impedit* would lie upon the first Disturbance, but it must be by *Journies Accompts*, that is, tho' the first Writ is abated by the Death of the Incumbent, which the Plaintiff could not avoid, yet if he bring a new Writ within 15 Days after the Abatement, that shall be a Continuance of the first Writ, and shall prevent the Defendant to take Advantage of any Matter which might arise after that Writ first brought.

**Where it shall
abate.**

'Tis certainly true, that the same Person shall not have several *Quare Impeditis* for one and the same Church, (l) for, if he hath, one may be pleaded in Abatement to the other.

So if the Bishop, against whom the Writ is brought, or any other Defendants (m) should be misnamed, 'tis a good Cause of Abatement; and so it is if the Plaintiff should be made a Knight, pending the Writ, because it was at his Election whether he would take that degree upon him or not.

So if the Plaintiff is Nonsuited after the Defendant appeared, or after he hath pleaded, for this is Peremptory and a good bar in any other *Quare Impedit*, tho' brought within the Six Months, (n) because the Defendant, upon a Title pleaded, hath a Writ to the Bishop to admit his Clerk, which is a good bar to any other Action of that Nature.

But if Three are Plaintiffs, and Two are Nonsuited, the Defendant shall not have a Writ to the Bishop, because the Third may have a good Title.

And 'tis to be observed, that if it should abate for any Fault in the Declaration, (o) the Defendant shall have a Writ to the Bishop to admit his Clerk, and so he shall if Judgment is given upon a Demurrer, but then the Defendant's Title must appear in the Declaration.

(i) 2 Roll. Abr. 411. (k) Cro. Eliz. 324. (l) Hob. 137. (m) Hut. 77. (n) 7 Rep. 57. (o) Dyer 240.

**Tenants
Common.**

If one Tenant in Common brings a *Quare Impedit* against his Companion (p) who hath an equal Interest with himself; and this appears on the Declaration, and the Defendant pleads it in Abatement, yet he shall have no Writ to the Bishop, because he did not make any compleat Title to himself, but only in common with another.

And now I have mentioned Tenants in Common, (q) I shall observe that they and Coparceners, and Joyntenants ought to joyn in this Action; (r) but yet there is a Case where one Tenant in Common presented alone, and upon a Motion in Arrest of Judgment this was objected, but it was over-ruled; the Book doth not tell us for what reason, but that upon the next Avoidance they might joyn, and if they were disturbed a *Quare Impedit* would lie, which can be no reason why one should Present, and so get the entire Patronage; so that this must be a mistake in the Reporter, and he himself puts a Quære to it.

**Against whom
it may be brought.**

It hath been a Question, whether the Patron, who is the Disturber, ought to be named in the Writ, because the naming him doth not seem to be material; for if he is named, and should die pending the Action, it shall not abate, as already hath been observed; besides, the Incumbent, who is the Disturber, is always in Possession, (s) and he is easily known, but it may be difficult to find out who presented him.

But now the Law is, that, if the (t) Patron is not named in the Writ, the Incumbent may plead it in Abatement, but the Ordinary cannot have that Plea, because his Acts do not depend upon the Patron's Right.

And the Reason seems to be very plain why the Patron ought to be named, for he ought not in common Justice to be dispossessed of the Patronage, without being made a Party to the Suit, that he may have Liberty to defend his Title; especially where he is to be divested of his Inheritance by the Judgment given against him; tho' it may not be so material to Name him where the Presentation is only to be recovered.

But the naming the Incumbent doth not concern the Patron, (u) for he cannot defend his Title, because at Common Law he could not Plead any Plea which concerned the Right of the Patronage, yet he must be named in the Writ, for otherwise the Patronage, and not the Presentation, will be recovered, and by consequence the Incumbent will not be removed.

If the Queen is Patroness, She may not be named in the Writ, and if She brings a *Quare Impedit*, She need not Name the Patron who presented last, unless where She hath a Title

(p) 2 Roll. Abr. 387. (q) 2 And. 23. (r) 1 And. 63. (s) 2 Leon. 58. (t) 2 Cro. 651. (u) Hob. 129. 7 Rep. 26. 2 Lut. 1089.

to Present by Lapse, or by Symony, and in such Cases if She is disturbed to Present, She must Name the Patron.

So where a Bishop hath collated by Lapse, a *Quare Impedit* may be brought against the Collatee without naming the Patron.

It is usual likewise to make the *Ordinary* a Defendant; and the Reason is to prevent a Lapse, for if the Patron is disturbed and the Church is not full, a Lapse may incur *pendente lite*, which my Lord Coke * tells us, is prevented by naming the *Ordinary*, and that if in such Case he should collate, his Clerk would be removed upon the Recovery of the Patron in the *Quare Impedit*.

But some late Writers are of another Opinion, viz. That barely making the Bishop a Defendant doth not prevent a Lapse, unless he is also found to be a *Disturber*, and that it cannot be for the Benefit of the Patron to Name him in that Writ; for if by the naming him a Lapse should be prevented, then if the Patron should recover against a Disturber, he can only have Damages to half a Year's Value of the Church, but if a Lapse is not prevented by naming him, and he should collate because the Patron was disturbed, and did not recover his Presentation within Six Months after the Avoidance, then if he should happen to recover afterwards, he shall have Damages to *Two Years Value* of the Church for the loss of his Presentation, and this is given by the *Statute W. 2. cap. 5.* but if making him a Party would prevent the Lapse, then the Patron ought not to recover the Two Years Value in any Case, because 'tis his fault not to make the Bishop a Party.

Having shewed who are to be made Parties to this Action, I shall now give an Account of the Process against them, which is by *Summons*, *Attachment* and *Distress*; and if brought against several, they may have several *Essoins* before Appearance, which may be taken either upon the *Summons* or *Attachment*; and if one of the Defendants is *essoined*, it must be adjourned for Fifteen Days, and the same Day is given to the rest, and if the Plaintiff doth not adjourn the *Essoin* he shall be *Non-suit*.

But the Defendants are not bound to appear after they have cast their *Essoins*, because this may be done by a Stranger, but they must appear upon the *Grand Distress*, otherwise the Writ shall be awarded to the Bishop, (a) and so it shall if they appear and make Default.

So one may appear before the rest, and Process shall be continued till *Distress* can be had against them, and the Plaintiff may declare against him who appeared, and if he pleads *non Impeditis*, &c. there shall be a Writ awarded to the Bishop with a *Cessat Executio* till the other have pleaded.

The Bishop, Patron and Incumbent who are usually the Defendants in this Action have all of them distinct Pleas.

* 1 Inst. 344, b. a Cro. 93. (a) 1 Roll. Abr. 587.

And first, the Bishop, if he hath no Title to collate, usually pleads that he claims nothing but as Ordinary, and so demands Judgment if he is not proved to be a Disturber.

He can plead no other Plea, especially if the Church is full; for having instituted a Clerk upon the Presentation of another Patron, he cannot plead his Title; nor counterplead that of the Plaintiff as the Incumbent may, because the Ordinary hath nothing to do with the Patronage, either in Interest or Dependency.

Then as to the Plea of the Patron, if his Clerk hath got Institution, he may plead a Title *pro forma*, and that by reason thereof he presented, and that his *Presentee* was admitted, instituted, and inducted, which is a full *Possession*, and that will be a good Title till a better doth appear.

But if both are *out of Possession*, then they must plead a good and sufficient Title, otherwise they cannot have a Writ to the Bishop to admit the *Presentee*; for in such Case both Plaintiff and Defendants are *Actors*, (b) and they must both set out their Titles by alledging a Seisin of the Advowson, and a *Presentation* by the Patron, or at least by those under whom he Claims.

In the next Place, as to the Incumbent's Plea, 'tis to be observed that before the *Statute 25 Ed. 3. cap. 7.* if a Patron had suffered a Benefice to Lapse, and the Bishop had collated, and afterwards the King pretending a Title had brought a *Quare Impedit* against the Ordinary and the Incumbent, he would certainly have recovered; because as he was not bound by Lapse, so the Defendants could not save themselves, for they could not deny the King's Title, and maintain the Patron's by their Plea, because at Common Law they could not plead to the Title of the Parsonage, but only in Abatement of the Writ, and sometimes the Patron would suffer Judgment to pass against himself by Default without defending his Right.

So that if a Patron who had no manner of Right had presented within Six Months after the Avoidance, and the true Patron had neglected to Present within that Time, and the Bishop had refused the *Presentation* of the wrongful Patron, and had collated by Lapse, and thereupon that Patron had brought a *Quare Impedit* against him and the Incumbent, he must have recovered, because, by the Course of the Common Law, neither of them were suffered to controvert his Title.

But this Inconveniency was remedy'd by that *Statute*, which gives the Incumbent Power to counterplead the King's Title; and not only in his own Case, but in Cases of like Nature, that is, where a *Presentee* is Incumbent, (c) for he is like an Incumbent upon a *Collation*, and therefore since the *Statute* he may counterplead the Title of any other Person who shall pre-

(b) Vaugh. 7, 8. (c) Hob. 321. Jones 4.

tend a Right of *Presentation* to that Turn, to which he was presented or collated, (d) altho' he claims nothing in the Patronage himself.

But then he must be *Persona impersonata*, (e) that is, he must be instituted and inducted into the Church, and so become a compleat Incumbent in Possession; and in such Case if the Patron should make Default, or plead, (f) an insufficient Plea, it shall not be prejudicial to the Incumbent, for if the Patron confesses the Plaintiff's Title, the Incumbent may deny it, (g) and set forth that of his Patron; and tho' he may in either of these Cases pray Judgment, and a Writ to the Bishop, yet no such Writ shall go to remove him till his Plea is determined.

'Tis likewise to be observed, that he must not only counterplead the Plaintiff's Right, but must shew his Patron's Title, and therefore must set forth that he was presented, and by whom, for that is traversable, (h) and by this means it will appear whose Title it is that he defends, for he shall never make himself (i) *Persona impersonata* by the Presentation of one Patron, and defend his Title under that of another, tho' it be a Title sufficient to destroy that of the Plaintiff.

But this must be understood where he pleads that he was presented by a Stranger, who is no Party to the Action, for in such Case he must alledge that his Patron was seised of the Advowson, or of the Mannor to which it did appertain, but if he pleads Plenarty *ex presentatione* of the Plaintiff himself, or by *Collation* from the Bishop, there he need not set out any Title.

So that upon the whole Matter, (k) the Patron and Incumbent cannot Prejudice each other by their ill pleading, or neglecting to plead, for both have a distinct Interest in the Thing, viz. the Patron in the Advowson, and the Incumbent in his Freehold, and in the Profits of the Church; and therefore it would be very unreasonable that any Act of the Patron should be prejudicial to his Clerk after he is instituted, or that the Act of the Incumbent should be injurious to the Patron.

But it may happen that neither the Plaintiff nor Defendant (l) may have Judgment, but a Third Person, where it appears on the pleading that neither of them have any Title; as for Instance, if one of our Universities should bring a *Quare Impedit* against the Defendant, for that the Patron is a *Recusant Convict*, and the Defendant pleads that the Advowson was Appendant to a Mannor, and that Two Parts thereof were seised by the Queen, who granted the same to the Defendant, *Cum pertinentiis*, here the Queen's Title appears upon the Record, and

(d) 7 Rep. 26. (e) March. 159. (f) Dyer 1. b. 3 Leon. 47. (g) Hob. 162. (h) Cro. Car. 591. (i) Hob. 319. Jones 5. 2 Lut. 1530. (k) 1 And. 238. (l) Moor 872, Hob. 126.

the Plaintiff could have none, because the Queen had seised Two Parts of the Mannor, and by consequence the Advowson was vested in Her, neither could the Defendant have any Right, because a Grant of a Mannor *Cum pertinentiis* did not pass the Advowson without naming it, therefore the Queen must have it; but where Her Title appears only upon *Evidence* given, there 'tis otherwise.

Now, tho' the Incumbent cannot prejudice his *Patron*, yet he may destroy his own Title by ill Pleading, (*m*) as if he mistakes a *Christian Name*, or if he varieth from the Day on which the Plaintiff did alledge the Disturbance to be made; as for Instance, if the Plaintiff sets forth the Disturbance to be on the 29th Day of March, and the Defendant entitles himself to an Incumbency on the 5th of May following, without traversing, confessing, or avoiding the Day alledged in the Declaration.

But if he pleads *ne Disturba pas*, or that there is no such Church for which the Plaintiff had brought this Action, he shall have a Writ to the Bishop, (*n*) for if there is no such Church the Plaintiff can have no Advantage by that Writ, and if there is, the Defendant hath no prejudice, for he doth not know it.

So if he pleads, that pending the Writ, the Bishop did institute another who was inducted, this shall not abate it, because the Defendant did not deny the Plaintiff's Title or the Disturbance, but only pleaded Matter relating to the Bishop.

He may plead that the Church is full *ex præsentatione* of the Plaintiff himself before the Writ brought, and this will abate it.

If there are several Defendants, and Judgment is had against one by Default, there shall be no Writ to the Bishop, till Judgment is likewise had against the other; and so 'tis if they (*o*) plead several Pleas, and one is try'd for the Plaintiff, there must be likewise Judgment upon the other Pleas before he can have any Effect of his Suit; and the reason is, because he hath made several Disturbers, and therefore must recover against all, for till that is done, it doth not appear that the Title is in him.

But if a Writ is brought against Two Defendants, and one of them appeareth upon the *Grand Distress*, and the other makes Default, a Writ shall be awarded to the Bishop to admit the Plaintiff's Clerk, and then if the other Defendant appears, and the Title is found for him, there shall another Writ likewise go to the Bishop (*p*) to admit his Clerk, and both being admitted, they may try the Right in an Action of Trespass.

Now when the Defendants have pleaded according to their respective Rights, if the Plaintiff replies, and Issue is joyned, the Jury must enquire into Four Things;

(*m*) Jones 427. (*n*) Jones 427. (*o*) Brownl. 161. (*p*) 2 Inst.
124. K k 3 1. Whe.

1. Whether the Church is full or not.

2. If full, then *ex cujus presentatione*.

3. If Six Months are passed since the Avoidance.

4. And lastly of the * yearly Value of the Church, which they are to find, deducting what is paid out of it.

If they should neglect to enquire into these Particulars, (q) it may be supply'd by a new Writ of enquiry, and no Writ shall go to the Bishop (r) till the other is returned, or the Damages released, for till that Time the Judgment is not given upon the whole Record.

So if the Jury give a Verdict for Costs, which they ought not to do in the Action, yet if there is a special Entry of the Judgment, viz. (s) *quod nullo habito respectu* to the Costs, the Court awards that the Plaintiff shall recover Damages, this will help it and make it good.

Of the Judgment, and the Effects of it.] The Judgment is to recover the *Presentation* and *Damages*, of both which I shall treat distinctly, for in effect they are Two Judgments, the one is, that the Plaintiff shall have a Writ to the Bishop, &c. which is the final Judgment between the contending Parties, by which the Right is determined; the other is for Damages given by the Statute W. 2. which were not recoverable at Common Law.

As to the *Presentation*, a Writ shall be awarded to the Bishop, and in such Case the Incumbent must be removed, if he was a Party to the Suit.

'Tis true, in *Boswell's Case*, (t) 'tis said, that if the Church is full of one who is a Stranger to the Writ, and if it happen to be *pendente lite* and the Plaintiff recovers, he shall have a Writ to the Bishop to remove him; and tho' it should afterwards appear that he had a Right to continue Incumbent, yet the Bishop is excused by the Writ.

But this Case is since denied to be Law, for regularly there ought not to be a Writ to the Bishop (u) without a *Seire Fac'* first brought against the Incumbent, to shew cause why the Plaintiff should not have Execution, because 'tis unreasonable to turn a Man out of Possession, without giving him an Opportunity to defend it.

'Tis true, the Bishop (w) can be at no Prejudice by admitting the Clerk for the Reason before-mentioned, tho' another is in Possession, or tho' himself had collated pending the Action; but by his Refusal or making an insufficient Return to the Writ, he may be fined, and a *Sicut alias* awarded to him upon a Penalty.

And not only so, but a *Quare non admittit* (x) lies against him, which must be brought in that County where the Refusal was

* Cro. Car. 592. (q) 10 Rep. 119. (r) Noy 66. (s) 1 Roll. Rep. 363. 3 Bulst. 175. (t) 6 Rep. 51. (u) Sid. 93. (w) 3 Leon. 138. (x) Cro. Car. 342. Dyer 40.

made, but he may plead that the Church is litigious between the Plaintiff, and a Stranger.

[*Writ of Error.*] But the Defendants may bring a Writ of Error to reverse the Judgment, and then the Court where the Proceedings are, may grant a *Superseas* to the Writ awarded to the Bishop.

It hath been a Question, if the Bishop (y) pleads that he claimed nothing but as Ordinary, and Judgment is obtained against him and the rest of the Defendants, whether he ought to be joined in the Writ of Error, because he hath no manner of Loss; but the better Opinion is, that he ought to be joined, for he is a Party to the Record.

If the Judgment should be affirmed upon the Writ of Error, the Plaintiff in the Action shall have *Damages*, but the Plaintiff in Error shall have none; if the Judgment should be reversed, and upon such Reversal the Judgment in a *Quare non admittit*, (z) if any such shall be, must be also reversed.

[*Damages.*] As to the Recovery of *Damages*, I must observe, that at Common Law none were recoverable in a *Quare Impedit*, they are given by the Statute of W. 2. (a) and are thus divided:

If the Defendant disturbs the true Patron, so that by such Disturbance the Six Months pass before he can recover, then if the Bishop collates (as he may) the Patron loses his Presentation *pro hac vice*, and for that loss he shall have *Damages* to *Two Years Value* of the Church upon his recovery against the Disturber; and if he is not able to pay it, he must be committed for Two Years.

But if the Six Months are not passed, and the Plaintiff recovers within that Time, then he shall have *Damages* only to *Half a Year's Value*, because he recovers his Presentation; and if the Disturber is not able to pay it, he shall be committed for Half a Year.

But notwithstanding this Matter, (b) there is a late Authority, that in such Case the Plaintiff shall have no *Damages*, for if the Church is void, he hath the Fruit of his Presentation by a Recovery within Six Months after the Avoidance, and that if the Jury give any *Damages* there shall be a *Remittitur* entered upon the Roll without moving the Court; and this is now become the constant Practice in such Cases, which seems very reasonable.

Neither shall any *Damages* be had against the Bishop where he claims nothing but as Ordinary, unless the Plaintiff will likewise prove that he is a *Disturber*, for till then he is not convicted of any wrong.

(y) Cro. Eliz. 62. 2 Cro. 94. (z) 8 Rep. 142. (a) W. 2. cap. 1. Anno 13. (b) 3 Lev. 59.

The Queen can recover no *Damages* in this Action, because she cannot lose her *Presentation* by any Lapse occasioned by the Disturber, and so She is not within the first Branch of the Clause of that Statute of *W. 2.* and if she is not comprehended in the first Clause, She cannot be in the second, for they have an entire Dependence on each other.

'Tis true, this was made a Question *Anno 7 Eliz. (c)* and it was held, that the Queen should recover Damages *pro valore medietatis Ecclesie*; and the Abridgment of *Fitzherbert (d)* is cited to prove it, which is likewise true; but in the same Book (*Titulo Damages*) 'tis held otherwise, and he cites a Case *Pasche, 3 H. 6.* to prove it, but there is no such Case in the Year-Book in that Term; and if he was mistaken in that, 'tis probable he might be so in the other, for *Anno 31 Eliz. (e)* it was adjudged otherwise, and a Judgment was reversed, because *Damages* were given for the Queen.

Register. See Office in Bishop, Archdeacon.

HAVING mentioned some Things of a Register in other Titles, I shall only add, that the Office of a Register is grantable for Life; and if any Question should arise concerning such Grant, it shall not be tried in the Spiritual Court, but at Common Law; for tho' the Subject-Matter of the Office is Spiritual, yet the Office it self is Temporal.

And as it may be granted for Life in *Possession, (f)* so it may be granted in *Reversion*, and even to an Infant *Exercendum per se vel Deputatum suum*; but this must be understood where it hath been usually granted in *Reversion* for Life, and not otherwise.

By the word *Usually* I mean before the Statute *1 Eliz. cap. 19.* and as to this Matter, there was no Difference before that Statute between the Grants of Offices belonging to ancient or new Bishopricks; for in both Cases the Bishops made such Grants, not by Virtue of any Prescription, but as they were Owners of the Bishopricks, and that there was an absolute Necessity for them to have such Officers, as *Registers, &c.* all * which Matter was debated in *B. R. Anno. 27 Car. 2.* where the Case was, that the Bishop of *Bristol*, which is a new Bishoprick, erected in the Reign of *H. 8.* and taken out of that of *Salisbury*, granted the Office of *Register* to one *Israel Pownell* and his Assigns, for Three Lives, which Grant was confirmed by the Dean and Chapter, and Livery and Seisin taken thereof; and this was adjudged a good Grant to bind the Successor, tho' made by a Bishop of a new Foundation, for 'tis made as he is

(c) Dyer 236. b. (d) Fitz. Abr. Tit. Quare Impedit. 181.
(e) Cro. Eliz. 162. 1 Leon. 249. (f) Cro. Car. 556. * 2 Lev. 136.

Owner of the Estate, and to an Officer which he cannot be without, and Grants of such Offices are not restrained by any Statute whatsoever; and therefore, if this Office was thus granted for Three Lives before the Statute, that will be an Evidence of the Necessity of it, and make it grantable in that Manner afterwards; but the Verdict in this Case was imperfect, because 'twas found that this Office was granted for Lives, *seperalibus temporibus*, after the Foundation of the Bishoprick, which might be very true, and yet not before, but after the Statute 1 Eliz.

And the better to regulate the Practice of these Registers there are several Canons * made, viz. *That if a Register or his Deputy shall receive any Certificate without the Knowledge or Consent of the Judge, or shall not cause a Person to be called who is cited to appear upon any Court-day, or who shall put off the Examination of Witnesses, or shall not obey the lawful Monition of the Judge, or doth not write, or cause to be written, such Citations and Decrees which are to be put in Execution; or shall not register Wills, or shall set down any Thing not decreed by the Judge, or in Transmission of Process ad quem shall insert any Thing that is not true, or omit any Thing negligently; or shall receive any Fee to favour the Party in Causes commenced ad instantiam partis, or shall be of Council with either of them concerned in the Suit, or shall do any Thing maliciously in the Execution of his Office, to the Prejudice of the Proceedings; in any of these Cases he shall be suspended by the Bishop for One, Two, or Three Months, according to the Quality of his Offence, and the Bishop may appoint some other Person to execute the Office, during such Suspension.*

There is another Canon (g) to regulate their Fees, viz. They are to take only such as were allowed by the Archbishop, Anno 1597. under Pain of Suspension for Six Months; and that if any Controversy should arise concerning their Fees, those only shall be lawful for them to take, which the Archbishop shall approve under his Hand.

And by another Canon (h) Two Tables of all Fees shall be set up by the Register, one in the Consistory-Court, and the other in his Office; which, if he neglect, or, being once set up, shall remove them, or hinder any one to see them, he shall be suspended.

By a late Act of || Parliament no Assembly for religious Worship shall be allowed, till the Place of Meeting be certified to the Bishop of the Diocese, or to the Archdeacon, or to the Justices of the Peace at their Sessions, and registred or recorded there respectively.

The Register of the Bishop of Chester refused to register such Certificate, the Parties grieved brought a Mandamus, to which he made a false Return, and upon an Action on the † Case

* Canon 134. (g) Canon 135. (h) Canon 136. || 1 Will.
† 3 Lev. 363.

brought against him, and a Demurrer to the Declaration, the Plaintiffs had Judgment.

3. Thus much concerning the Officer. I shall now mention the Canons, concerning a Book which is called a Register; and first, by the Injunctions of *Ed. 6.* the Parson and Parishioners are required to keep such a Book in the Church, to register the Names of the Persons married and buried in the Parish; this Book is to be kept in a Chest provided for that Purpose, and there must be Two Locks and Keys for the Parson and Churchwardens, and it must be taken out every Sunday after a Marriage or Burial, in order to register the same in the Presence of the Churchwardens; the Person who is in fault must forfeit 3 s. to the Use of the Poor.

The same Things are required by the * Canons of King *James*, but with a little Addition:

That a Parchment-Book shall be provided at the Charge of the Parish, wherein the Day of every Christning, Wedding and Burial shall be registred, since the Time any Law for that Purpose was first made, and that was about the 30th of H. 8. at the Request, and by the Means of the Lord Cromwel; and this was now required by the Canon so far as the ancient Books could be procured, but especially since the Beginning of the Queen's Reign; That a Chest should be provided at the Charge of the Parish with Three Locks, and as many Keys for the Minister, and each of the Churchwardens, so that neither of them should take out the Book but when they were all present; that when a Page is full written, the Minister and Churchwardens shall subscribe their Names, and that the Churchwardens shall every Year in April transmit the Names of all Persons christned, married, or buried, to the Bishop or his Chancellor, and the Days and Month in which it was subscribed by them; and if either of them make Default he might be cited by the Bishop or his Chancellor, and proceeded against as a Contemner of the Canon.

Residence.

I Shall not insist on any Arguments in Point of Conscience for Residence, 'tis a Duty of which the Clergy are or ought to be Judges themselves; but I must say, that when once they have taken a Personal Charge upon themselves, and a Charge of so high a Nature as a Cure of Souls, it cannot be so well attended as where the Person is actually Resident.

Upon this Reason the Question might arise, Whether Residence was of Divine Right? It was warmly disputed in the Council of *Trent*, whether the Residence of Bishops was so or not; those who denied it produced Reasons from Experience, viz. That in *Rome*, where Residence was observ'd by the Head of that Church, the People were as disorderly as in other Dio-

* Canon 70.

cesses, where Bishops did not constantly reside: This might occasion Father Paul to observe, that the Absence of Prelates was not the true Cause of Abuses in their Diocesses, for if it was, then there would be less Corruption where they reside, than where they do not, but 'tis not always so; and for this we have an Instance in the French Bishops, who being ordered by a Decree of Parliament to go and discharge their Duty in their Diocesses, which, if they neglected, they should be compelled to it by a Seizure of the Goods and Equipages; * Mazeray tells us, that most of them lived such disorderly Lives, that their Absence would have been less Scandalous than their Residence.

As to us here in England, upon the first erecting Parochial Churches, every Clergyman was bound to reside on his Living. The old Saxon Canons † are very strict in it; for how could a Man read the Prayers of the Church, preach to the People, administer the Sacraments in his Church, resolve Penitential Cases, give a good Example in those committed to his Care, unless he is constantly Resident amongst them?

Residence is likewise required by the Canons of our Church, which prohibit Dispensations to be granted, for holding Two Benefices, but only to such who shall be thought worthy for their Learning, and very able and sufficient to discharge their Duty, that is, such who are Masters of Arts in one of the Universities of this Realm, or who is a publick and sufficient Preacher licensed; and even in such Case he must give sufficient Caution to make his Personal Residence in each of his Benefices, for some reasonable Time in the Year, and that they be not above 30 Miles distant from each other, and so that he hath an able Preacher lawfully allowed in the Benefice where he doth not reside.

But it may be a Question, that since the very Office of a Minister requires a Personal Residence, whether a Dispensation can justify him to be absent from that Charge, without some very good Cause; as the Care of his Health, or some publick and important Business, either for the Church, or the Queen; for tho' by the Canon Law every Minister is to be Resident; and for that Purpose, if he is chosen to any Office, he hath the King's Writ to discharge him, which my Lord Coke tells us is grounded on (a) Scripture, viz. *Nemo militans Deo implicatur se negotiis secularibus*, yet there are some Exceptions to this Canon, viz. If the Clergyman is in the King's Service he shall be excused; and this appears by an ancient Writ in the (b) Register, called *De non residentia Clerici Regis*, which I thus transcribe.

Cum Clerici Nostri ad faciendam in Beneficiis suis personalem residentiam dum in nostris immorantur obsequiis compelli aut alias super hoc molestari seu inquietari non debeant, necq; ac Progenitores

* Chron. Abr. Vol. 6. fo. 434. † Canon 41. (a) 2 Tim. 2. 4. (b) Register 58. F. N. B. 44. g.

nostri, quondam reges Angliæ, hujusmodi Libertate & Privilegio pro Clericis nostris a tempore, quo non extat Memoria, semper hactenus usi sumus; vobis mandamus quod dilectum Clericum nostrum J. S. Parsonam Ecclesiæ de H. vestra Dioceseos, qui in Cancellaria nostra nostris jugiter intendit obsequiis, ad Personalem residentiam in Beneficio suo præd' faciend', dum in iisdem Obsequiis nostris immoratur, nullatenus compellatis; & sequistrum, si quod in fructibus aut aliis bonis Ecclesiæ suæ præd' ea occasione per vos aut vestros fuerit appositum, sine delatione relaxari faciatis; Teste, &c.

Agreeable with this Writ is the Statute called (c) *Articuli Clerici*, viz. That Clerks employed about the Exchequer shall not be bound to be resident in their Churches; and that the King and his Ancestors, Time out of Mind, have used, that Clerks employed in his Service shall not be compelled to keep Residence in their Benefices; and such Things as shall be thought necessary for the King and Common-wealth ought not to be prejudicial to the Church; and my Lord Coke (d) tells us, that this Paragraph ought to be written in Letters of Gold.

The Law allows some other Excuses for Non-residence, as Imprisonment without Fraud, Removing into a better Air for the Recovery of his Health; and by the Statute of 21 H. 8. a Scholar studying in the University, the Queen's Chaplains in Ordinary; and any Person compelled by the Injunction of the Lord Chancellor to appear in any Suit in Equity, (e) and therefore if an Information shall be brought upon the said Statute against a Non-resident, for the Forfeiture of 10*l.* per Month, it must be set forth that the Defendant voluntarily did absent himself, &c. or 'tis naught.

So by the Statute of 25 H. 8. cap. 16. the Judges of the King's Bench and Common-Pleas, the Chancellor, and the Chief Baron of the Exchequer, and the Queen's Attorney and Solicitor, may have each of them one Chaplain, to be attendant on their Persons, who may be Non-resident.

And by the Statute of 33 H. 8. cap. 28. the Chancellor of the Duchy of Lancaster, and Groom of the Stole may have the like; but then they must twice in every Year reside on their Benefices for the Space of 80 Days each Time, under the Penalty of 40*s.* but none of these Persons can qualify a Man to hold Two Livings.

My Lord Coke farther informs us, that Cardinal Woolsey was a great Protector of Non-residents, and that soon after his Attainder a Statute (f) was made, which in the Preamble mentions several good Effects of Residence, viz. that it would be for the virtuous Encrease and Maintenance of Divine Service; that it would advance the Preaching and Teaching of God's Word, by godly and good Example; that it would be for the

(c) Art. Cleri. cap. 8. (d) 2 Inst. 625. (e) Cro. Eliz. 100.
(f) 21 H. 8. cap. 13.

Maintenance of Hospitality; the Relief of the Poor; the increase of Devotion, and the good Opinion of the Laity towards the Clergy: And then by the 17th Paragraph 'tis enacted, *That every Spiritual Person promoted to an Archdeaconry, Deanry, or DIGNITY in a Cathedral or Collegiate Church, or beneficed with a Parsonage or Vicaridge shall be personally Resident on his DIGNITY, Prebend or Benefice, and if he wilfully absent by the Space of One Month together, or of Two Months, at several Times in one Year, he forfeits 10 l. per Month, to be divided between the Queen and Prosecutor.*

And by the same (g) Statute the Chaplains of several Peers, by being retained in their Service, may obtain Dispensations to hold Two Livings; and in such Case are excusable for Non-residence in one, which cannot be, if by the other Paragraph they are punishable for being absent from one of them; therefore this Clause must not be interpreted to bar those who are qualified by Birth, Degree or Retainer, to hold Two Livings from that Liberty they have to absent themselves from One, so as they reside on the other.

There are very few Instances of Prosecutions upon this Statute, (h) which may be brought by Information in the Crown-Office; but some there are, viz. (i) *Anno 41 Eliz.* an Information was brought for the 10 l. per Month; the Defendant pleaded that he was chosen Gospeller of St. Paul's in London, and that he was Resident there by reason of that *Dignity*; and, upon Demurrer to this Plea, Two Judges were of Opinion that it was a *Dignity*, to excuse the Defendant from being Resident on his Benefice.

There is likewise a President in * *Rastall's Entries* of an Action of Debt on this Statute for 40 l. for Four Months Non-residence.

And 'tis to be observed, that the word *Dignity* in this Statute relates only to *Dignities* of the like, or inferior Nature, to Archdeaconries or Deanries, and therefore Bishopricks are not comprehended under that Appellation; but if Bishops are not Resident they may be punished by Ecclesiastical Censures; but not by this Statute; (k) and of this we have a very notable Instance, for even when the Pope's Supremacy was exalted here, H. 3. sent his Mandate to the Bishop of Hereford to reside on his Bishoprick, otherwise he would seize his Temporalities: But if he hold any other *Dignity* in *Commendam* with his Bishoprick, then he is comprehended in this Law.

And as by these Statutes, so by the Common Law, Non-residence is allowed, that is, 'tis not absolutely forbidden: As for Instance, 'tis allowed by that Law, where the Benefice is annexed to some *Dignity* in the Church; and in such Case there must

(g) Paragraph 11. (h) Cro. Car. 146. (i) Cro. Eliz. 663.
* Fol. 599. (k) 1 Inst. 25.

be a Vicaridge endowed, but the Vicars who supply the Places of those dignified Persons are not only bound to Personal Residence, but by a Constitution of Archbishop *Langton*, are required to take an Oath to reside on their Vicaridges; and the reason why a Vicar is more strictly obliged to Residence than a Rector is, because he may depute a Vicar; but one Vicar cannot depute another, and therefore his Oath is to reside on his Vicaridge, *nisi aliter Dispensatum fuerit a Diocesano suo*.

By the Canon Law a Minister is said to be Resident in that Place where he discharges his Office, tho' he lives in another Parish; but the Courts at *Westminster* have a different Acceptation of Residency; for it hath been a Question, whether the Residence intended by this Statute must be in the very Parsonage-House? And my Lord *Coke* (1) tells us, it was resolved, that tho' the Parson lives in the same Parish, yet if he doth not live in the Parsonage-House he is Non-Resident; and the reason is, because one Thing intended by the Statute was to prevent Dilapidations, which might not be so well done where a Tenant and not an Owner dwells in the House.

Justice *Croke*, Serjeant *Moor*, and Mr. *Gouldsbrough*, who report the same Case, all agree that the Court was divided; but the better Opinion was, that if the Parson is Resident in any other House in his Parish 'tis sufficient; for the Parsonage-House might be alienated by a former Parson, with the Consent of the Patron and Ordinary, or leased so as his Successor might not live in it.

About 12 Years afterwards there happened the very like Case, (m) and it was objected, that since the Statute requires the Parson to be Resident on his Benefice, that it must be intended his Parsonage-House, because the whole Parish is properly his Benefice; and therefore in Propriety of Speech he cannot be said to reside on the Whole. The Case was compounded by my Lord *Coke*; but he continued still in his former Opinion, that the Parson ought to be Resident in his Parsonage-House, tho' the Reasons given by his Contemporaries seem to be of greater Weight and Authority.

There are some other Statutes which relate to Residency; as for instance, the Statute of 13 *Eliz. cap. 20.* provides, That all Leases made of any Benefices shall endure no longer than the Lessor shall be Resident, *and serving his Cure without absenting above Eighty Days in one Year*; and if he shall so Absent, the Lease shall be void, and he shall lose a Year's Profit of his Benefice, to be distributed by the Ordinary among the Poor, that is, upon Complaint made to him, and Sentence given for this

(1) 6 Rep. 21. Cro. Eliz. 590. Moor 540. Goulds. 169.

(m) 2 Brownl. 54.

Offence, he may within Two Months after such Sentence and Request made by the Churchwardens, or one of them, Sequester the Profits to some of the Parishioners; and if the Ordinary should neglect, then every one of them may retain the Tythes, and the Churchwardens may enter on the Glebe-Rents and Duties of the Church, and employ it for the use of the (n) Poor, till a Sequestration shall be made by the Ordinary.

But there is a Proviso, that every Person qualified to have Two Benefices, may demise One of them to his Curate only; but such Lease is to endure no longer than he is Curate, and not absenting above Forty Days in any one Year.

By another Statute (o) all Covenants and Contracts made for permitting any Person to enjoy any Benefices, *shall be as Leases made thereof*, that is, they shall be void within the Act of 13 Eliz. by the Parson's Absence above Eighty Days.

Now, a Non-Residency within the Statute of 21 H. 8. may not be an Absence to avoid a Lease upon the Statute of 13 E. for if a Parson lives in another Parish, and not in his Parsonage-House, which, according to my Lord Coke's Opinion is a Non-Residency within the Statute of H. 8. yet 'tis not so within the Statute of 13 Eliz. (p) for if he comes constantly to his Parish-Church and Officiates there, he can never be said to be *absent from his Cure*.

I shall conclude this Title with the Observation of Father Paul, (q) in his History of the Council of Trent, that for the first 700 Years after Christ, every Minister in the Western Church was Resident on his Living, and that when a contrary Usage crept into the Church, Canons and Decrees were made against it.

That it was the Opinion of that Council, that Residence is a Thing of Divine Right to him who hath a Cure of Souls; and if so, it must be a great Evil for a Clergyman to take Two Benefices, for 'tis impossible for him to reside on both at the same Time.

But notwithstanding this Opinion, and all the Canons which have been made against Non-Residence, some Arguments have been raised to prove, that 'tis only *malum quia prohibitum*, for if it was Evil in its self, than no Dispensation could make it otherwise; and we daily see that the Law allows Dispensations for Pluralities, and by consequence it allows a Man to be Non-Resident.

It has been likewise affirmed, with some colour of Reason, that the Clergy do not undertake any Cure, but under such Measures which are allowed by Law; and that a Competency

(n) 18 Eliz. cap. 11. (o) 14 Eliz. cap. 11. (p) 1 Bulst. 111.
(q) Fol. 496.

is always supposed where Residence is strictly enjoined, and where that cannot be had by one Benefice, the Church hath Power to mitigate the Severity of the Canons, and to dispense with the taking more than One.

That the Clergy do not subsist now as formerly, when those Canons were made, for then *Celibacy* was enjoined, but now Marriage is allowed them by Law; so that a Living which is allowed a Competency for a single Person at that Time, will not be sufficient to maintain a Family now; and that there can be no inconveniency in Pluralities, because the Bishop is to take care that the Benefices, where the Parson himself cannot be Resident, should be supplied with able Curates.

But after all, since it was originally intended by those Canons, that a Minister should not undertake more than he is able to perform; and since the Cure of Souls is personally committed to him by the Bishop, I must leave it to the Consciences of those who are concerned, whether any Dispensation can be good in such Case.

Resignation.

THIS is the yielding up a Benefice into the Hands of the Ordinary; 'tis called Renunciation by the Canonists, and 'tis the same thing with a Surrender at Common Law; but Usage hath restrained this word, and made it applicable only to a Spiritual Living.

And therefore I cannot apprehend why the word *Resigno* (r) should be thought improper in the *Latin* form of a Resignation; certainly it must be a meer Nicety of the Judges, *Anno 12 Eliz.* to hold it so, and to affirm that the formal words are *renuncio cedo & dimitto*, for I find the word *Resigno* almost in all the Forms of Resignation; (s) 'tis so in *Fairchild* and *Gayre's* Case, where the words are *Concedo & Resigno*; 'tis so in the Register, (t) which being one of the most ancient Books in the Law, and of great Authority, I shall transcribe the Form as 'tis there.

In Dei nomine, Amen. Ego J. S. Rector & Incumbens Ecclesia Parochialis de H. in Com. S. & Dioces. Cicestria, volens, & ex certis causis & considerationibus, veris, justis, & legitimis, me in hac parte specialiter moventibus, ab onere, cura, & regimine dictae meae Rectoriae de H. & pertinenten. ejusdem, penitus Exonerari, eandem Rectoriam meam, & Ecclesiam parochialem praed. una cum suis juribus, membris, & pertinentiis universis, in manus Reverendi patris Johannis, permissione divina, Cicestriae Episcopi, loci istius Ordinarii & Diocesani, vel ejusdem Vicarii in Spiritualibus generalis, seu al-

(r) Dyer 294. Std. 389. (s) 2 Cro. 63. (t) Fol. 306. b.
* Dyer 294.

terius cujuscunque hanc meam Resignationem admittend. potestatem habentis, vel habituri, non vel in metu vi aut nec dolo malo ad idem inductus, nec aliqua sinistra machinatione motus, sed ex certa scientia, animo deliberato & spontanea voluntate meis, purè, simpliciter & absolute Resigno, ac re & verbo vacuum dimitto, jure quoque titulo & possessione meis in eadem Rectoria sive Pàrochiali Ecclesia una cum suis juribus, membris, & pertinentiis universis præhabitis & mihi hactenus concessis omnibus & singulis * renuntio, eademque cedo, & ab iisdem recedo totaliter & expresse in his Scriptis. In cujus rei Testimonium Nomen & Sigillum meum his præsensibus apposui 5 die Aprilis, Anno, &c.

Signat. & attestat. nobis præsensibus & attestantibus.

That which I shall observe upon this *Latin* form is, that a Resignation must be made to the Ordinary; (u) 'tis true, it may be made before a Publick Notary, but it must be directed to the Bishop and certified to him; and if 'tis in the Case of a Prebend it makes no Alteration of the Law, for it must be resigned to the Ordinary, and not to the Queen; because if a common Person is Patron thereof, an Injury may accrew to him for want of Notice of the Resignation, which the Queen is not bound to give.

Therefore where an Action of Trespas on the † Case was brought against the Defendant for Dilapidations, setting forth, that he was Rector of C. and that *Ecclesiam resignasset*, without saying in *Manus Episcopi*, for that reason the Declaration was held insufficient.

And generally where-ever a Bishop hath a Right to Admit, he hath likewise a Right to take a Resignation; (x) therefore Donatives are not resigned to him, but to the Patron, because he doth not Admit to such a Cure; and Deanries (y) in the Queen's Gift are not resigned to him, but to the Queen.

In the next Place I shall observe that it must be made to a Superior, (z) *spontè, purè, & absolute*; and therefore if 'tis made upon Condition that another should be admitted to the Benefice, 'tis void, unless it is in Cases of **Exchange**. Exchange; for if Two Clergy-men would exchange Benefices, each of them must resign to the proper Bishop, and the respective Patrons must Present them again to each Benefice, which if they refuse, or the Ordinary will not Admit them respectively, then the Exchange is not executed; and in such case either Clerk may return to his former Living; tho' one of them should be admitted, instituted, and inducted to the Benefice of the other, because in Cases of Exchange

* Dyer 294. (u) 2 Rol. Abr. 358. Noy 147. † 1 Lutw. Reynolds vers. Hewet. (x) 2 Cro. 63. (y) Plowd. 398. (z) 1 Rol. Rep. 173, Owen 12.

(a) the Law doth annex a Condition to the Resignation, viz. that it be fully executed on both sides; and not only so, but the Condition is expressed in the very form of the Exchange it self.

In Dei nomine, Amen. Ego J. S. Rector Ecclesiæ de H. Dioceseos Cicestria, volens ipsam Ecclesiam meam cum Ecclesia (b) de B. dicta Cicestria Dioceseos, cujus Rector Existit W. C. certis iustis & legitimis causis, sine dolo & fraude canonicè permutare, ipsam Ecclesiam meam ex causa permutationis hujusmodi, & non alio modo in sacras manus venerabilis in Christo patris Dom. Johannis Cicestria Episcopi resigno; supplicans humiliter & devote ut præfat. J. S. hujusmodi causa permutationis ipsam resignationem sic factam & non aliter velitis admittere, & negotium permutationis hujusmodi quatenus ad vos attinet fideliter expedire, & protestor expresse in hic Scriptis, quod si dicta permutatio debitum non sortiatur effectum quod hujusmodi mea resignatio præd. pro nulla penitus habeatur.

And in the same Book there is a Form of a Protestation of returning again to his old Benefice in case the Exchange is not executed; and it was my Lord *Hobart's* Opinion in (c) *Colt and Glover's* Case, that each Party might return to his proper Benefice where the Exchange was not compleat.

By this ancient Form it appears that the Exchange must be made *iustis & legitimis Causis*; and agreeable with this is that Paragraph in the *Statute* against (d) *Simony*, viz. *That if any Incumbent with Cure &c. shall corruptly resign or exchange his Benefice, or shall corruptly take any Benefit for resigning, &c. both the Giver and Taker shall forfeit double the Value of the Benefice, to be divided between the Queen and the Prosecutor.*

After a Resignation is made, 'tis in the Power of the Ordinary whether he will accept it or not; for since the Law hath made him the proper Person to whom it ought to be made, it hath likewise trusted him with judging whether he shall accept or refuse it.

'Tis agreed that a Resignation (e) is not good unless the Ordinary accepts it; but this must be understood of a Benefice with Cure, &c. for in such case a Resignation is not good unless the Bishop accepts it, because it may be prejudicial to many without such Acceptance; (f) but where there is no Cure 'tis good without Acceptance.

Lastly, If an Action of Debt should be brought on a Bond (g) given to the Patron, conditioned to resign a Benefice to the Ordinary of the Diocess, so that the same may be void, and that it may be lawful for him to Present again, if the De.

(a) Fiz. Exchange. Plito 10. (b) Register 306. b. (c) Hob. 152. (d) 31 Eliz. cap. 6. (e) 2 Cro. 64. 198. (f) Noy 147. (g) Sid. 387. Raim. 175.

Defendant pleads that *in forma juris resignavit* the Rectory to W. then, and now Bishop of D. Ordinary of the Place, which Resignation he accepted, this shall be tried by a Jury, and not by a Certificate from the Bishop.

The Case was thus, *viz.* The Defendant entered into a Bond with this Condition, That if he do and shall upon the First Day of October next, or before, if W. B. (the Patron) at the Parsonage-House of Cowley shall request the same, and before the Defendant shall * take another Benefice in due manner, resign the said Rectory, Parsonage, or Benefice of Cowley aforesaid, unto the Bishop or Ordinary of the Diocese, whereby the Rectory may become void, and the said W. B. may lawfully Present to the same, then the Obligation to be void.

The Defendant pleaded, that before he took a second Benefice, *viz.* 21 Septembris at such a Place, *in forma juris resignavit*, the said Rectory to H. then Bishop of L. the Ordinary there; which Resignation the said Bishop accepted, and the Defendant averred his Plea; the Plaintiff replied, that *non resignavit* the said Rectory to the Bishop *modo & forma prout* the Defendant *superius placitando allegavit*, and concludes to the Country: To which Replication there was a general Demurrer, and the single Point was, whether this Resignation should be tried by the Country, or by the Bishop's Certificate; and adjudged in the Common Pleas, that it should be tried by the Country.

Mr. Siderfin, who was Council for the Defendant, tells us, that there was a Writ of Error brought in B. R. upon this Judgment, and the Matter in Law which he was to argue was, that the Plaintiff ought not to conclude his Plea to the Country but to the Bishop, *viz.* *Et quia hujusmodi causæ cognitio ad forum spectat Ecclesiasticam ideo, mandari est Episcopo London' loci præd' Diocesis convocari coram se in hac parte convocandi rei veritatem super præmissis diligenter inquirat & quod inde inquisitionem constare faciat hic (such a day) per literas suas patentes & claus' quod ideo dies Dat. est partibus præd. hic, &c.* But the Matter was ended by Arbitration.

Sacrament.

THIS is the most solemn Act of Worship among us; it was instituted by our Saviour himself, and therefore 'tis not like other Rites by which we express our Duty to God, for those may be enjoined by the Church.

It consists in *Matter* and *Form*, that is, there must be material Things sanctified by proper words, by which those Things are determined to that end; and in receiving it there are federal Acts of Religion, both in respect to God and our selves,

* *Viz. He Instituted and Inducted.*

viz. on God's part by a secret Blessing derived from him to us, and on our part by Promises which unite us to his Church, and by this means Divine Grace is conveyed to us.

The learned Bishop of *Sarum* tells us, that this part of Worship hath been more corrupted than any other, which was chiefly occasioned by these words, *viz.* *This is my Body*; and that in every thing else the Institution was both plain and easy, but by those words the People were taught to believe that Christ was corporally present in the Sacrament, and therefore the Priests did magnify it with all external Pomp and Shew; for the Vessel in which it was put, and the Garments in which he officiated, were consecrated and anointed with great Solemnity and Devotion; then the Bread was lifted up and worshipped by the People, the Priest carrying it under a very rich Canopy.

The words of Consecration were always spoken by the Priest, but not in the presence or hearing of the People, which (as that learned Prelate rightly observes) was very suitable to the invisible Change made of the Elements of Bread and Water, *viz.* for as the one could not be seen, so the other was not to be heard.

And not only so, but some miraculous Stories were invented and offered to the People as Reasons why the words should be kept secret from them, *viz.* because certain Shepherds having by chance heard a Priest consecrating the Wafer, did themselves repeat the words over their own Bread, and immediately it turned into Flesh.

The ancient Fathers of the Church had no Notion of such a miraculous Transubstantiation, and as soon as ever it came to be extolled by the Priests, there were several learned Men in the Ninth Century who wrote against it; and 'tis no wonder that the Priests were so industrious to propagate this Doctrine, because the People must necessarily have a very great Reverence for an Order of Men whose Character qualified them for such mysterious Performances, so that in the Eleventh and Twelfth Centuries it came to be generally believed.

For the first 300 Years after this strange Doctrine was received, it was usual to consecrate a whole Loaf, which immediately turned into the compleat Body of Christ, so that when it was distributed to the People, they were made to believe that one had a Toe, another a Finger, and a third an Eye or Tooth; and to support their Belief in so odd a Contrivance, some Miracles were pretended to be done by every part of the Body.

But this being thought a very undue and indecent way of eating the Body of our Saviour, the Schoolmen who had always some nice Inventions to please the People, instructed them to believe that the whole Body was in every part of the consecrated Bread, and that upon dividing it a new Body was immediately separated from the other parts. Now,

Now, if the Body should not happen to be new, 'tis certain the Invention was so, and contrary to what had been the received Opinion for many Years, so that the Miracles which were pretended to be done by those old parts of Christ's Body were become useles, and therefore there was a Necessity of contriving new ones to support this new Opinion; and as that great Prelate farther informs us, instead of a Loaf they consecrated a Wafer as more suitable to this new Doctrine, that it might not be contradicted too much by our Senses; and lest the sensible effects of Wine might dispose the People to believe that notwithstanding the Consecration it remained so still, therefore the Cup was denied to the Laity.

Anno 2 Ed. 6. these Things were thought proper to be reformed, and for that purpose a new Office for the Communion was set forth, which began with an Exhortation before the receiving it; and it was almost the same with what is used now, only after that part of the Exhortation wherein we are advised to confess our Sins to God, 'tis added, *That those who approved auricular Confession to a Priest should not censure those who were satisfied with this general Confession to God.*

Then after the Priest had received, he was to return to the People, and to read another Exhortation to them, which we now use with a very little Variation in all other Circumstances; only when the Bread was to be distributed the Priest pronounced these words, *viz. The Body of our Lord, &c. preserve thy Body, &c.* but when the Cup was given the words were, *viz. The Blood of our Lord, &c. preserve thy Soul, &c.* as if a greater Value was to be set on the Cup than on the Bread, for one was to preserve the *Body*, but the other the *Soul*; but this was afterwards altered by Archbishop *Cranmer*, who appointed that in both Paragraphs the words should be *preserve thy Body and Soul, &c.*

As to the Posture in receiving the Sacrament, 'tis probable that at the first Institution it was at a Table, the Communicants lying on one side; but that can be no Argument why it should be so now, for since the Eucharist came in the room of the Passover, and since that was altered from its first Institution by *Moses*, to which Alteration our Saviour himself complied, therefore this may be likewise altered without any Crime.

The *Jews* were to eat the Paschal Lamb standing with their Loins girt, and with Staves in their Hands, and Shooes on their Feet, which was a Posture suitable to Travellers as they were; but as soon as they came out of the Wilderness to the Land of Promise, that Posture was laid aside, and then they eat the Lamb at the Table, and in such a Posture as they eat at other Times.

Our Saviour conformed to this; and he being now exalted in his Throne, it may therefore be more proper to receive the

Sacrament with greater Signs of outward Respect, than when he was in a State of Humiliation, in which State he was at the very first Institution of this Ordinance.

But since the receiving the Sacrament is now become a legal Qualification to entitle certain Persons to have and enjoy several Offices, I shall therefore mention those Laws by which this is required.

By Statute of 25 Car. 2. *All Persons, as well Peers as others, who shall have any Office, either Civil or Military, or who shall receive any Salary by Patent from the Queen, or have any Command, or Place in Trust under her, or shall be of the Household, shall within Three Months after their Admittance in, or receiving their Authority or Employment, receive the Sacrament in some publick Church upon some Sunday, and deliver a Certificate thereof the next Term after their Admittance, either in the Court of Queen's-Bench, or at the Quarter-Sessions where they reside, under the Hands of the Minister and Churchwardens, and prove it by credible Witnesses upon Oath.*

The Persons neglecting are disabled to hold their Offices, and they are made void by the Act it self; and if they execute the same afterwards upon a Conviction, either on an Information or Indictment in the Courts at Westminster, or at the Assizes, they shall not be Plaintiffs in any Suit at Law, or in Equity, or Guardians to a Child, or Executors or Administrators, or capable of a Legacy, or Deed of Gift, or bear any Office, and shall forfeit 500 l. to the Prosecutor, to be recovered by Action of Debt, Bill, Complaint, or Information in the Courts at Westminster.

This Statute being so penal, the Minister is obliged by Law to administer the Sacrament in both Kinds; but then by the Rubrick there must be Three at least to communicate, and he must not, without lawful Cause, deny it to any who shall devoutly and humbly desire it.

But since there are some lawful Causes of Refusal, therefore 'tis necessary that the Minister should have convenient Time to enquire whether the Persons are fit to be Partakers of this Ordinance, and for that Purpose they are enjoined by the Rubrick to signify their Names to the Curate, at least a Day before 'tis administered.

By the Canon (a) and Rubrick it appears what those lawful Causes are, viz. Those who live in any known Sin, without Repentance; those who maliciously contend with their Neighbours shall not be admitted to the Communion before they are reconciled.

By another Canon (b) 'tis not to be administered but to such as Kneel, nor to any who refuse to be present at the Prayers of the Church, and this under Pain of Suspension; nor to any who are Depravers of the Common-Prayer, or of any Thing contained in the Articles of our Religion, unless they shall shew

(a) Canon 26. (b) Canon 27.

their Repentance, and promise before the Minister and Churchwardens, either in Writing, or by Word, to do so no more.

So by the Rubrick none are to be admitted to the Sacrament till they are actually Confirmed, or ready, and desirous so to be; nor if they have done any wrong to their Neighbours, so that the Congregation are offended at it; nor those who live obstinately in Malice or Hatred, nor to any * Stranger; for a Minister is not obliged to give it to any, but to those of his own Parish.

But if a Parson will refuse to administer the Sacrament without any just Cause, an Action on the + Case lies against him, because a Man may have a Temporal loss by such Refusal.

In the next Place I shall consider how often in a Year the Parishioners are required to receive it.

How often to be administered.

The Primitive Christians made it a constant Part of their Worship every Week; so that, it being a customary Thing, some Persons, pretending to greater Strictness, were of Opinion, that by frequent communicating they did not receive it with that due Care and Reverence as they ought, but only in Conformity to the Orders of the Church; and therefore they thought it better to abstain for some Time, that they might not come as Formalists, but with a due Temper of Mind, and the better prepared to receive it, and so by Degrees it came from a frequent and constant Use to a total Disuse.

The late Bishop of Worcester tells us, that our Reformers look'd on this Disuse as a Corruption crept into the Church, and therefore they were of Opinion, that it ought once more to be brought up to the Primitive Practice, but that unreasonable Scruples in some Persons, and Misapprehensions in others, and a general Indifferency in Matters of Religion, had put a Stop to the reviving this ancient Part of Devotion.

However, they enjoined that it should be received by all People Three Times in the Year, of which *Easter* was to be one; this is required by the Rubrick, which is confirmed by Act of Parliament; and 'tis agreeable with some ancient Constitutions made for that very purpose.

We have some Instances in our Books (c) of Prosecutions for not receiving the Sacrament, as *Anno 17 Car. 2.* the Churchwardens presented a Man for this Neglect, and upon that Presentment there was a Libel, and he was excommunicated in the Archdeacon's Court; and tho' he suggested that he received it elsewhere, tho' not in his own Parish, which he likewise pleaded in the Spiritual Court, where they refused that Plea; yet the Courts at *Westminster* would not grant a Prohibition, because, both the Matter of the Libel and Plea were of Ecclesiastical Cognizance; and when they refused the Plea, the Party ought to Appeal.

where it is to
be administered.

It must be offered freely in the publick Church, and not in private Houses; but if a sick Person is not able to come to his Parish-Church, he must acquaint the Curate with it, and that Two more will communicate with him; and in such Case the Rubrick doth not prohibit, but enjoins the Minister to give it in the sick Man's House.

This is likewise allowed by the *Canon* (d) where the Parishioner is impotent, or not able to go to Church, or very dangerously Sick; but if administered in a private House, to a Person who is well and able to go to Church; in such Case the Minister for the first Offence is to be suspended, and for the next he shall be excommunicated.

And because this solemn Ordinance (e) should always be had in due Reverence, the Law hath appointed, that he, who depraves it, or doth any Thing in Contempt of it, shall be committed by Three Justices of Peace, who are to take the Examination of Two Witnesses to prove the Fact on Oath, and bind them in the Penalty of *5 l.* a-piece to appear at the next Sessions, and give Evidence, and the Offender being found guilty is to be fined.

The Prosecution must be within Three Months after the Offence.

Sacrilege.

GOD is not only the most Perfect, but the Supreme Being, both in Heaven and Earth; and therefore hath an absolute Dominion over all Things in this World.

This is a Principle so evidently true, that it needs no Proof, but one of the old Philosophers, who had more Wit than Religion, drew two contradictory Consequences from this Principle; the one was, that all Thieves are Sacrilegious Persons, which he proved by this Syllogism, *viz.* Those who rob what belongs to God are Sacrilegious; But all Thieves rob what belongs to God, for all things belong to him; Therefore they are Sacrilegious.

The other Consequence was directly contrary, *viz.* That no Thieves were Sacrilegious; which he likewise proved by another Syllogism, *viz.* Those who take and carry a Thing from one Place to another, both which Places belong to God are not Sacrilegious; But those who rob Churches, do take and carry things from one Place belonging to God, to another which also belong to him, for all Things and Places belongs to him; Therefore those who rob Churches are not guilty of Sacrilege.

This last Sophism seems to be calculated for this degenerate Age, tho' many Ages since it hath been solidly confuted by a learned * Heathen.

(d) Canon 71. (e) 1 Edw. 6. c. 1. * Seneca de Beneficiis lib. 7. c. 7. But

But not to trouble my Reader with such Quirks, I shall under this Title define what is Sacrilege; and shall mention what Punishment our Law inflicts on Sacrilegious Persons.

Sacrilege is the stealing some thing out of a publick and sacred Place. It may be committed Three ways as the Canons tell us, that is, either in respect to Persons, Places or Things.

Sacrilege against Persons is the laying violent hands on those, who in a peculiar manner are set apart for the Worship and Service of God; this is accounted a Violation of their Privileges and Immunities, but I shall not treat of it in this Sense, but only as it relates to Places and Things.

As to Places, in this respect the Church in construction of Law is the Mansion House of God, and therefore 'tis Burglary to break it open *and enter it* in the Night time * with an Intent to steal.

This seems to be the blackest Offence by which the Church is violated, and therefore it was punished with the greatest Severity.

Amongst the Heathens all Offenders of this nature were put to Death, and they were not so much as allowed the common Humanity of Burial, and all their Goods were to be Confiscated.

But it was not punished with Death upon the first introducing Christianity here; for he who robbed the Church was to restore Nine times the Value of the things taken, and if not able to Pay it, then he was to undergo a Corporal Punishment by Stripes.

'Tis true, one of our Historians mentions that King *Athelstain*, (f) caused some Thieves who had robbed St. *Edmunds* Church in *Suffolk* to be hanged; but in the same Book he tells us they were held by some invisible Power that they could not carry away what they had stoln.

This Monkish Whimsie may occasion some Persons to suspect the truth of the whole Story, and the rather because there were no Laws made in his time relating to Ecclesiastical Matters, but they were in most things only a Repetition, or rather a Confirmation of such as were made by his Grandfather King *Alfred*, in whose Reign the Punishment of Sacrilege was only Pecuniary, that is, the Offender was to restore the Value of the thing taken, and was likewise to Pay the Value of his Head, which was about 40 *l.* but it was an aggravation of the Fact to commit Sacrilege on a Sunday, for in such Case he was not only to Pay the value of his Head, but his Hand with which he committed the Fact was to be cut off; but this he might redeem at the same Price his Head was Valued at.

* Dyer 99. (f) *Malmf. de gestis pontificum. Lib. 1.*

And many Years afterwards the Punishment was by Excommunication, of which we have a remarkable instance, *An. 38 H. 3.* when the King himself, standing with his Hand on his Breast, and the whole House of Peers with lighted Torches in their Hands, pronounced those Persons Excommunicated, who maliciously deprived the Church of their Right, &c. then they threw down their Torches extinguished and smoaking, and all of them pronounced these Words, *viz. So let those who go against this Church be extinguished in Hell.*

Our Ancestors were so confident, that a Sacrilegious Person could not escape the Judgment of God, that they delivered him over to Satan, or as they usually said they cursed him with *Bell, Book and Candle*; that is, after the Curse pronounced, which was done Four times in a Year, they said *fiat*, then they shut the Book, put out the Candle, and ringed the Bell.

But now if there is no actual Force, and Goods of the Church are taken from thence, in such Case the Churchwardens may have an Action at Common Law against the Offender, and shall recover Damages, or they may Libel in the Spiritual Court (g) against him *pro salute anima*, which is the most proper remedy, and there he may recover the things *in Specie*.

Schoolmaster See Canons.

Seats in the Church.

SINCE many Controversies have happen'd concerning Seats.

- (1.) In the Body of the Church.
- (2.) In Isles.
- (3.) In Chancels.

I shall now mention what the Law is as to these particulars.

(1.) As to Seats in the Body of the Church, the Freehold of the Soil is in the Incumbent, and the Seats are fixed to the Freehold; yet because the Church it self is Dedicated to the Service of God, and the Seats are Built that the People may more conveniently attend Divine Service, therefore where any contention is about a Seat in the Body of the Church, upon complaint made to the Ordinary, he may decide the Controversy by placing that Person in it whom he thinks fit, and this Power is conferred upon him by Law, because he, who hath the general Cure of Souls within his Diocese, is presumed to have a due regard to the qualities of the contending Parties, and to give Precedence to him who ought to have it.

And tho' the Seats are built and repaired at the Charge of the Parish; and the Churchwardens should prescribe, that by reason thereof, they have used to dispose them to such Persons

(g) Sid. 281.

as they thought fit, yet since of common Right the † Ordinary hath the Disposal thereof; and by the same Right the Parishioners ought to repair them, therefore such Prescription shall not be allowed against his Jurisdiction.

But this Jurisdiction extends only to placing or displacing the *Inhabitants of the Parish*, for the Ordinary cannot grant a Seat to a Man and his Heirs, because a Seat in the Church properly belongs to some *House* in the Parish, and not to the *Person*, but as Owner of the House; and if such grant should be good to a Man and his * Heirs, they would have the Seat, tho' they lived in *another Parish* which is very unreasonable; and contrary to the original Intention of building Seats in Churches, which was for the *Inhabitants of that Parish*, that they might more conveniently attend the Service of the *Church*; and certainly if the Bishop cannot make such a Grant, no private Person can do it, for the Reasons before-mentioned.

But where there is no Contention, and the Ordinary doth not interpose, because there is no Complaint, there the *Parson* and *Churchwardens* have Power to Place the Parishioners in Seats; and in some Places the *Churchwardens* alone have that Power by Custom, as in *London*.

If a Seat is built in the Body of the *Church*, without the Consent of the Bishop, the *Churchwardens* may pull it down, because it was set up by a private Person without the License of the Ordinary; but it hath been held, that, if in removing such Seat they cut the Timber, or break it, (a) an Action of Trespass lies against them.

This, like many other Cases reported by Mr. *Noy*, is not Law; for the Freehold of the *Church* being in the Incumbent, when the Person hath fixed a Seat to it, 'tis then become Parcel of his Freehold, and consequently the Right is in him, so that the breaking the Timber could not be prejudicial to the other, because he had no legal Right to the Materials after they were fixed to the Freehold.

And because Seats in the Body of the *Church* are to be disposed by the *Parson* and *Churchwardens*, (b) therefore it was formerly held that a Man cannot prescribe for a Seat there; and yet he might prescribe for the upper Part of a (c) Seat there.

But now the Law is settled as to this Matter, viz. that one may prescribe for a (d) Seat in the Body of the *Church*, setting forth that he is seized of an ancient House, &c. and that he and all those whose Estate he hath therein, have, Time out of Mind used, and had a Seat in the Body of the *Church* for themselves and their Families, as belonging to the said House, (e) and that

† 2 Lev. 241. Raim. 246. * Roll. Abr. 288. Poph. 150. (a) Noy 108. (b) Moor 278. (c) Noy 78. Latch. 116. Palm. 424. (d) 12 Rep. 105. Noy 129, 130. (e) 2 Roll. Abr. 288. Hob. 69. Sid. 88. 203. Raym. 52. 246. they

they repaired the said Seat; and the Reason why he must alledge that he repaired it is, because the Freehold being in the Parson, there must be some special Cause shewed for such a Prescription; but as to this Matter the Court distinguished between an Action on the Case brought against a (f) Disturber, and a Suggestion for a Prohibition; for in the first Case you need not alledge that you repair, because the Action is brought against a wrong Doer; but upon a Suggestion for a Prohibition it must be alledged that you repair, because otherwise you shall not divest the Ordinary of that Right which properly belongs to him.

Tenants in Common cannot make a joyn't Prescription to a Seat in a Church, but they may prescribe severally; and if they should bring an Action jointly for a Disturbance, and upon the Evidence it should appear, they are Tenants in Common, they must be nonsuited, because such Evidence will not maintain the Title upon which the Action is founded, for tho' 'tis a Possessory Action, yet, since that Possession must be maintained by a Title derived out of a Prescription, they must prescribe severally.

And in those Prescriptions there is not much exactness required; for if an Action on the Case, is brought for disturbing the Plaintiff, &c. 'tis not sufficient for him to alledge, that he is seised in Fee of a *Messuage*, &c. (without saying 'tis an *ancient Messuage*) and that he and all those whose *Estate he hath* in the said *Messuage*, had (without saying *Time out of Mind*) a Seat in the Church which they used to repair as often there was occasion, &c. this is well enough, because the Action is founded on a wrong done by one who disturbed him in his Possession; in which Action the Plaintiff will recover Damages, if the Verdict is found for him; 'tis true, he may Libel in the Spiritual Court, and prescribe there for a Seat, &c. but if the Prescription is denied a Prohibition will be granted; if 'tis not denied then that Court may proceed to Sentence, which, if it happen to be against the Prescription, in such Case also a Prohibition will lie, because the Suit being upon a Prescription, the Proceedings in it were *coram non iudice* in that Court; but this seems unreasonable, (g) for it can be only to discharge the Person of the Costs which he ought to pay.

[*Use of the Church.*] As to Seats in *Isles of Churches*, the Law is, that if a Man hath a House in a Parish, and a Seat in the *Isle of the Church* which he hath repaired at his own Charge, he shall not be dispossessed by the Bishop; if he should, he may have a Prohibition, (h) because it shall be intended to be built by his Ancestors, with the Consent of Parson, Patron and Ordinary, and appropriated by them to his and their use, and if he is disturbed by any other Person in sitting there, he may have an Action on the Case against him, but then he must prove

(f) 1 Lev. 71. 3 Lev. 73. (g) Het. 94. (h) 12 Rep. 104. Godb. 200. 2 Cro. 366. that

that he repaired it, (i) and so it was adjudged between *Dawtree* and *Dee* (k) for Seats in a little Chappel in the North Part of the Chancel of *Petworth* in *Sussex*, for tho' no Man can tell the true reason of Prescriptions, yet some probable reason must be alledged to gain such a peculiar Right, and none is more probable than repairing it.

And this will Entitle a Man to a Seat in an *Isle*, tho' he lives in another Parish; and therefore where the Plaintiff set forth, that he had an ancient Messuage in the Parish of *H.* and that he, and all those whose Estate he had in the said House, had a Seat in the *Isle*, in the *Parish-Church* of *B.* this is a good Prescription for a Seat in an *Isle*, because he or they might Build and Repair it, tho' 'tis not a good Prescription to have a Seat in *Nave Ecclesie* of another Parish, *Sid.* 361.

Chancel.] As to the Chancel, the Ordinary hath no Authority to Place any one there, for that is the Freehold of the Rector, and so is the *Church*; but he Repairs the one, but not the other, and 'tis for this Reason that an Impropriator hath the chief Seat in the Chancel.

But yet a Man may prescribe to have a (l) Seat here, as belonging to an ancient Messuage.

Sequestration.

THIS is a separating the Thing in Controversy from the Possession of the contending Parties; as for Instance, when a Spoliation is brought to try which of them is rightful Parson, 'tis usual for the Judge at the Petition of either of them (setting forth that Opposition may be made in collecting the Profits) to decree that they shall be sequestred, and to order the Churchwardens to collect them; and this must be published in the Church, and they are to give Bond not only to collect, but to keep the same for the Use of him who shall be found to have the Right, and to account to him, and the Judge usually appoints some Minister to supply the Cure in the mean Time, and appoints the Sequestrators to allow a certain Reward to that Minister.

After the Suit is determined, the Sequestrators are to deliver the Profits which they have collected to him who hath the Right, and this they must do, either in Specie, or the Value, if sold; if they refuse they may be compelled by the Ecclesiastical Court, and if they delay to come to an Account, the Judge may assign the Bond to the Party grieved, with a Letter of Attorney to sue for the Penalty.

But Sequestrations may be made in several other Cases; as for not repairing the Church or Parsonage-House, if the In-

(i) *Sid.* 89, 201.

(k) 2 *Cro.* 604. *Bridgm.* 8. *Palm.* 46.

(l) *Noy.* 133.

cumbent neglects, being once admonished to do it, then some Part of the Profits of his Living may be sequestred for that Purpose ; but it hath been a Question whether the Tythes of an Impropiator may be sequestred to repair the Chancel ; 'tis certain they might whilst they were in the Hands of the Monks ; but, being now made a Lay-Fee by a particular Act of Parliament, the Spiritual Court hath no Jurisdiction in that Matter, but the usual Course in such Cases is by Citation, and in Case of Contumacy to proceed to Excommunication.

Sometimes a Benefice is sequestred by Virtue of some Process, out of the Courts of *Westminster*, and this is where a Judgment is obtained against a Clergyman ; and, upon a *Fi' fa'* directed to the Sheriff to levy the Debt and Damages, he returns, that the Defendant is *Clericus beneficiatus non habens Laicum feodum in balliva mea* ; then another *Fieri Facias* is directed to the Bishop, who thereupon issues forth a Sequestration under his Episcopal Seal, directed to the Churchwardens to levy the same *de bonis Ecclesiasticis*, and by Virtue thereof the Tythes shall be sequestred.

But if the Parson had made a Lease of his Tythes before the *Fi' fa'* came to the Hands of the Bishop, then he may return that *nulla habet bona Ecclesiastica*, and this was the Case of † *Picard against the Bishop of Ely*, who made such a Return ; and it was allowed, tho' in Truth the Defendant had a Spiritual Living in that Diocese, but had let it before the Writ came to the Bishop.

But the most usual Occasion of a Sequestration is upon the Vacancy of a Benefice ; for, during that Time, the Profits of the Church are in Abeyance, and are therefore to be received by the Churchwardens, by the Appointment of the Bishop, under the Seal of the Court, and this is to provide for the Cure during the Vacancy.

But they cannot bring an Action in their own Name for the Tythes, therefore the proper Remedy to recover them is by Libel in the Spiritual Court.

Sexton. See Clerk of a Parish.

Sidesmen.

IT was usual for Bishops in their Visitations to summon some credible Persons out of every Parish, whom they examined on Oath concerning the Condition of the Church, and other Affairs relating to it.

Afterwards these Persons became standing Officers in several Places, especially in great Cities, and when Personal Visitations were a little dilused, and when it became a Custom for

† Sid. 276.

the Parishioners to repair the Body of the Church, which began about the Fifteenth Century; these Officers were still more necessary, and then they were called *Testes Synodales*, or *Juratores Synodi*; some called them Synodsmen, and now they are corruptly called Sidesmen.

They are chosen every Year, according to the Custom of the Place, and their Business is to assist the Churchwardens in enquiring into Things relating to the Church, and making Presentments of such Matters which are punishable by the Ecclesiastical Laws.

Simony.

THIS is a Name of Reproach which the Canonists have fixed on all Contracts and Agreements for Gain, in disposing or obtaining any Benefice or Ecclesiastical Promotion.

The Schoolmen, and my Lord Coke from them, derive the Word from *Simon Magus*, but I cannot imagine for what Reason, unless every Thing of a Spiritual Nature may be called the immediate Gift of the Holy Ghost, for that was what he designed to purchase.

I know the Bishop of Worcester's Opinion was, that the Right of discharging a Spiritual Trust, and the Right of enjoying the Profits which are set a-part for such a Spiritual Use, do always go together; but can any one infer from thence, that he, who purchaseth those Temporal Profits, doth therefore purchase that Spiritual Trust, and so resemble it to the Case of *Simon Magus*?

His Sins were Hypocrisy and Ambition; for being a Sorcerer himself, and having done some wonderful Things in *Samaria*, by the Help of the Devil, he plainly saw, that, in converting the People of that City from Heathenism, God gave more Power to *Philip* than the Devil gave to him, and therefore he believed and was baptized, not for any Zeal which he had for Religion, but merely out of an hypocritical Design to be admitted into the Church, that he might be entitled to that Power which was given to the Apostles; for having seen what extraordinary Gifts were conferred by them, only by Imposition of their Hands on those who were designed for the Ministry, he desired to purchase the like Power, that is, to confer the immediate Gifts of the Holy Ghost on whom he should lay his Hands; not that he intended the Glory of God by it, but that he might be in greater Esteem amongst the People than whilst he was a Sorcerer.

Hildebrand, who was the worst Pope, made a severe Decree against Offenders of this Nature, viz. That both the Buyers and Sellers of any Ecclesiastical Livings, and all those consenting to it should be damned with *Simon Magus*.

Pope *Gelasius* was not altogether so severe, for he allowed the Offender to repent; but if he would not, then he was to be *anathematis nuncrone percussus*.

The

The Churchmen in those Days did not only make Canons against Simony, but strange and ridiculous Stories were invented to frighten Men from it; such was that Story of a Clergyman, who gave the Emperor's Son a Silver-Pipe to make him a Bishop when he should be Emperor himself, which he did; but being soon afterwards afflicted with Sickness, there was a Fast appointed for Three Days together for the Recovery of his Health; but the poor Emperor was all that while amongst the Devils, who darted Flames into his Mouth thro' a Pipe; but being recovered, he degraded the Bishop whom he had promoted by Simony; and this Punishment, with his Repentance, was an Atonement for that Offence.

I must confess, as a Silver-Whistle was only a Bribe for a Child, so the Story is fit to be imposed on no other.

Under this Title I shall treat of Three Things:

1. What Simony was before the Statute, and what Contracts amount to it since.
2. The Punishment of the Patron.
3. The Punishment of the Clerk thus presented.

As to the first of these Particulars the Canonists tell us, that every Agreement relating to buying or selling Benefices is *turpe Lucrum*, which brings *turpe Commercium* into the Church. That such Contracts have been condemned by several Councils, and severe Canons have been made both against the Patron and his Clerk; that Simony is *voluntas five desiderium emendi vel vendendi spiritualia vel spiritualibus adherentia*, but certainly this is contrary to our Law; for mental Simony is not punishable, either by the Common or Statute Law, it must be real Simony, either by actual Payment of Money, or a Contract to pay it.

Now *quilibet contractus ex turpi causa* is odious in the Sight of the Law; and tho' Simony is such a (a) Contract, yet it was not void for that Reason, before the Statute 31 Eliz. tho' 'tis since.

Neither my Lord Coke or Hobart mention what Simony was at Common Law; one says 'tis *Vox Ecclesiastica*, and in Mackaller and Toderick's Case (b) it was objected, that the Common Law did not take any Notice of it, for that was a mere Ecclesiastical Offence; but Justice Croke, who reports this Case, tells us, this was denied by the Court; 'tis reported likewise by Justice Jones, but he is silent as to this Particular.

And because the Common Lawyers have not yet declared what Simony is, therefore a learned Prelate was of Opinion, that the Canon Law, notwithstanding the Statute, must still be the Rule and Measure by which Simony is to be determined, and the rather, because, he tells us, 'tis not so much as mentioned in the (c) Statute, for if it had, the Judges of the Com-

(a) 3 Inst. 153. (b) Cro. Car. 361. (c) Eccles. Cases 279, 293, 294.

mon Law (d) would then have sufficient Reason to declare what it is.

One would imagine that this great Prelate took his Observation from Mr. Attorney Noy, (e) who affirms the same Thing in his Report of *Winccomb's Case*.

But the word Simony is not only mentioned in the Statute, but 'tis there explained what is meant by it, *viz. That 'tis a Corruption in Presentations, Collations and Donations, of and to Benefices, (f)* which last Paragraph that Bishop himself in another Place confesses to be an Explanation of what Simony is; and yet he would have the Canon Law to be the Rule to determine it.

I admit it was so before the making this Statute, and that it was then a mere Spiritual Offence, of which the Common Law took no Notice in the abstracted Notion and Sense of the Word; and so it was held by the whole Court of Common-Pleas about Nine Years after the making this (g) Statute, *viz. That Simony was not against our Law, nor any Bond or Contract relating to it, made void by any Statute; and Anno 12 Eliz. (h)* in the same Court it was held, that it belongs to the Spiritual court to determine it, and not to the Courts at *Westminster*.

But the force of those ancient Canons was almost worn out by Time, and even when they were put in Execution, both the Patron and Incumbent often escaped unpunished; for the Right of the Patron could not be taken away by a Canon, and the Incumbent was to hold the Living till he was deprived by a Judicial Sentence in the Spiritual Court, which was not very often obtained, because such Proof was wanting which the Ecclesiastical Law required, therefore it was thought necessary, *Anno 31 Eliz. cap. 6.* to make a Statute against Simony.

If any Person do Present or Collate to a Benefice with Cure, for any Reward or Assurance, or give or bestow any Ecclesiastical Living for any corrupt Consideration, such Presentation, &c. and every Admission, &c. thereon shall be void, and the Queen may present to the same for one Turn.

This last Clause was very necessary to punish the Patron in the Loss of his Presentation; for before the making this Statute the Punishment was chiefly inflicted on the Clerk, and the Patron escaped, for he might present another.

But now he is not only to lose his Presentation *pro hac vice*, but he is to forfeit double the Value of the Living, according to the utmost Value, and this he forfeits upon a corrupt Contract only, tho' the Clerk is not presented; but the Queen is not to have the Presentation, unless the Clerk is actually presented; and in such Case, if he dies Incumbent, the

(d) Idem 293. (e) Noy 25. (f) Eccles. Cases 59. (g) MoBr 564. (h) Cro. Eliz. 789. Moor 914.

Queen shall not lose Her Presentation, because it was void, and the Church was never full of him.

The Words of the Statute which relate to this Matter are, *viz.* He, who gives or takes such Reward or Assurance, forfeits double the * Value of One Year's spiritual Promotion; and the Person corruptly taking such Promotion shall be disabled to enjoy the same.

This Clause takes in both the Patron and Incumbent; but before I shall treat of it in particular, I will mention how the Law stood in relation to a corrupt Patron, before the making this Statute, *viz.* Such Patron was to be excommunicated, and to lose the Right of Patronage for ever; this was enjoined by the Canon, but never attempted to be put in Execution, for if it had, the Courts at *Westminster* would have granted Prohibitions, because they would never suffer a Canon not confirm'd by Act of Parliament, or not generally received here, to determine a Right to any Freehold.

I know the Spiritual Courts mince the Matter, by telling us they do not determine any such Right, for they meddle only with the manner of obtaining the Presentation, which is very true; but, if that proves to be Simoniackal, the Admission and Institution is void, which by Consequence divests the Person of his Freehold, or rather, the Incumbent hath no Freehold there, because the Statute hath made the Church void, so that he cannot properly be said to be deprived of that which he never had.

Of Simony Since the Statute.] Since the making this Statute, the following Contracts have been adjudged to be Simony.

If a Father purchases the next Avoidance in the Presence of his Son, the Incumbent being then Sick, and soon afterwards dying, and then the Father presents his Son, this is Simony, as Sir *Simon Degg* tells us from Serjeant *Moor*; (i) but Justice *Croke*, who reports the same Case, informs us, that none was of that Opinion, but *Anderson*; for the Father is bound by Nature to provide for his Son, and that the buying the next Avoidance, with an Intention to present him, was not Simony, tho' the Son was privy to it, because it was no Offence in the Father, and by Consequence could be none in the Son.

There have been some Remarks made on this Judgment, and with some Colour of Reason, *viz.* That if 'tis Simony in a Friend to buy the next Avoidance when the Incumbent is Sick, and in the Presence of him whom he designs to present, and afterwards presents him accordingly, it must be so in the Father, who buys it in the Presence of his Son; for the Statute doth not distinguish between Persons; and the Reason given to support that Judgment fails in this Respect, for a Man is bound by Nature to provide for himself, as well as for his Son; but no Man will deny it to be Simony to purchase so for himself:

* To be divided between the Queen and Prosecutor, upon Conviction on an Information. (i) *Moor* 916. *Cro. Eliz.* 2685. *Owen* 87. Besides,

Besides, if the Provision for a Son should be a Reason to purchase the next Avoidance in his Presence, when the Incumbent is dying, the same Reason would continue after he is dead, as well as when the Church was full of a sickly Person, for the Father is as much bound by Nature to provide for his Son then, as he was before; and yet it must be agreed, that notwithstanding that natural Obligation, if he purchase for his Son after the Church is void, 'tis Simony.

In *Booth* and *Potter's* Case, (k) the Father made the corrupt Agreement, and the Son was not privy to it, yet he was held to be a Person disabled by this *Statute* to accept that Benefice; this was the Case Sir *Simon Degg* (l) tells us he had seen; and my Lord *Coke* himself, in another Case, affirmed the Law to be so.

'Tis true, the Simony of the Father was clearly proved in that Case, and it doth not appear but that the Son was privy to it; for the Reporter tells us, that it was *alleged* that he did know it, and that might be the Reason why he was adjudged to be a Person disabled.

But there was something extraordinary in that Case; for after the Simony of the Father was proved, and the King's Presentee was admitted, the Father procured him to be deprived; but before the Deprivation he obtained a Grant of the next Avoidance to a Friend, who, soon after the Deprivation, presented the Son again, and thereupon he brought his Ejection; but the Law was held to be against him, for he must necessarily be privy to the Simony of his Father, because the King's Presentee was admitted upon it; therefore it seems plain, that he took the Benefice upon a corrupt Contract, which is expressly prohibited by the *Statute*.

The Words are, *viz.* The Person corruptly taking a Promotion shall be disabled to enjoy the same: Now this Clause being so very penal on the corrupt Taker, it hath been a Question whether a Person can be said to take a Benefice corruptly, who is admitted to it upon a corrupt Presentation, to which he was not privy or consenting.

We have my Lord *Coke's* (m) Opinion, that such Person is not disabled by the *Statute*; but he tells us the Living is void; and if the Queen, whose Turn it is, will then present him, tis good, and he shall enjoy that Benefice; and *Butler* and *Baker's* Case is cited in the Margent of the 3d *Institutes* to prove it.

The Case is reported by Justice *Croke* (n) and Serjeant *Moor*, in which it appeared, that the Incumbent did not know the corrupt Agreement till after he was inducted, and yet it was held that he was disabled to enjoy that Living which is contrary to my Lord *Coke's* Opinion.

But certainly it must be a Mistake in *Booth* and *Potter's* Case to say, that the Person not privy to a corrupt Agreement is disabled by the express Words of the *Statute*, 'tis the Presenta-

(k) 2 Cro. 553. (l) 2 Cro. 385. 3 Bulst. 92. (m) 3 Inst. 154. (n) Cro. Eliz. 788. Moor 913. M m 2 tion

tion which is void ; (o) but a Man can never be said to be corruptly taking, who is not privy to the corrupt Agreement ; so that, tho' he loses his Incumbency upon such a Presentation, yet he is not so disabled but he may be presented again to the same Benefice.

But there may be a Simoniactal Promotion, where neither the Patron or the Clerk are privy to it ; as if a Friend of the one give Money to a Relation of the other to procure him to present that Clerk, in such Case the Right of Presentation will be vested in the Queen *pro hac vice*, (p) and an Incumbent who came in under such a Title enjoyed the Benefice above 20 Years.

'Tis true, Justice *Windham* was against the Judgment, because the Patron's Right might be defeated by Collusion between Two Strangers, which he held to be very unreasonable.

If the Clerk himself had contracted with the Patron for the next Presentation, when the Incumbent was sick, (a) and for that Purpose that it should be granted to a Friend, who, upon the Death of the Incumbent, presented that very Person, this is Simony.

So, if a Stranger or Relation of any Clergyman, during the Sickness of the Incumbent, agrees with the Grantee of the next Avoidance to present him, and accordingly he is presented ; this is Simony, tho' the Clerk is not privy to the Agreement, *a fortiori*, where he is a Party, and knows the corrupt Contract.

And so it was adjudged in *Trinity-Term* † 4 *W.* the Case was, that one *Boughton* had the Grant of the next Avoidance, &c. the Church became void ; and then *Richards*, a Friend of the said *Boughton*, agreed with one *Taylor* that *Boughton* should present *Hide*, and that *Taylor* should pay *Richards* 20 *l.* per Annum for Six Years, if *Hide* should so long live, and entered into a Bond of 200 *l.* for Performance of this Agreement, which Bond was made to the Use of *Boughton*, and so *Hide* was presented ; a *Quare Impedit* being brought against him, and another against *Boughton*, who presented *Hide*, the Incumbent pleaded that he had not Notice of the said Agreement, to which Plea the Attorney-General demurred, and *Boughton* himself traversed the corrupt Agreement, but it was adjudged Simony ; for 'tis not Notice which is very difficult to be proved, but the corrupt Agreement, which is the material Point in all Cases of Simony.

If pending a *Quare Impedit* (b) the Plaintiff sells the Advowson *ea intensione*, that such a Clerk should be presented after the Incumbent should be removed, who was afterwards presented, this is Simony.

(o) 12 Rep. 100. Lane 37. (p) Sid. 329. (a) Hob. 165. Cro. Eliz. 686. † 3 Lev. 337. (b) 2 Vent. 39.

If a Stranger purchaseth the *next Avoidance* (c) when the Incumbent is Sick, and then, after his Death, presents a Clerk, who was not privy to the Contract, but acquainted with it afterwards, this likewise is Simony.

And generally any Covenant or Agreement, made under any manner of Consideration whatsoever, to present a Person is Simoniackal; (d) As for Instance, an Advowson was mortgaged in Fee, the Church became void by the Death of the Incumbent, and another was presented by Usurpation; the Mortgagee brought a *Quare Impedit* to remove him, and, pending the Suit, the Heir of the Mortgager brought a Bill in Equity to redeem, which was decreed accordingly; and that the Mortgagee should permit him to prosecute the *Quare Impedit* in his Name.

Afterwards one *Hammerfly* articulated with the Heir at Law to purchase the Advowson, and the Heir covenanted to convey it to him, and to present such a Clerk upon the present Avoidance as the said *Hammerfly* should appoint, who likewise covenanted to pay him 100*l.* upon the Delivery of the Writings concerning the Title, 50*l.* when the Plaintiff should recover Judgment in the *Quare Impedit*, and 200*l.* more upon perfecting the Conveyance; and all this in a special Verdict in Ejectment was found to be done on purpose to present the Defendant, who was afterwards presented before the Conveyance was executed, and this was adjudged to be Simony.

But if a Father, upon the Marriage of his Daughter, covenants to pay a Portion, &c. and there is a distinct Covenant that he will procure the Son-in-Law to be admitted to such a Benefice upon the next Avoidance; this shall not be intended to be Simoniackal, because the Covenant had no Dependence upon the Marriage, it was an entire Covenant by it self, and not made in Consideration of Marriage, for if it had, then it would have been Simony; but it may be made so by a special Averment, shewing that it was Simoniackal.

|| The like Case happened *Anno 5 W.* where the Incumbent covenanted with the Patron to resign by all lawful Means at his Request, so that he might present again; and the Patron covenanted to pay the Incumbent 150*l.* on such a Day, in lieu of the Tythes; this was held to be a distinct Covenant, and not Simoniackal, without a special Averment.

So a Promise to give Money, (e) in Consideration the Plaintiff would endeavour to procure the Person to be Rector of such a Church, is Simoniackal.

If the Patron takes a Bond of the Clerk (f) to pay so much Money every Year towards the Maintenance of the last Incumbent's Son at the University, and whilst he is unpreferred, or to his Widow, this is not Simony; 'tis true, Sir *Simon Degg* directs his Reader *quarere rationem*; but he has given a very good

(c) Moor 916. (d) Cro. Car. 425, † 3 Lev. 115. || 1 Lut. Rea.
(e) Jones 341. (f) Noy 142. M m 3

Reason for it himself, for he says these are charitable Resolutions.

If the next Presentation is granted to a Clergyman (g) who gives Bond to pay Money for it when the Church becomes void, 'tis Simony.

If the Clerk gives a Bond to pay (h) 100 l. *per Annum* to the Patron, and an Action of Debt is brought upon this Bond; and the Defendant exhibits a Bill in Equity to be relieved, setting forth that the Bond was given upon a Simoniackal Agreement, after the Defendant had answered, this Bill was admitted as Evidence to prove the Simony.

If a Clerk agrees with a Stranger (i) to procure the Grantee of the next Avoidance to surrender to another, and to influence the Surrendree to present him when the Church is void, which was afterwards done, this also is Simony.

By this Statute, the Person who *Admits, Institutes* or *Inducts* a Clergyman, for any Reward or Assurance, forfeits double the Value of one Year's Profits of the Living, and the Admission and Institution is void, and the true Patron may present again; but no Lapse shall incur upon such Avoidance, till Six Months after Notice given by the Ordinary to the Patron.

And by the same *Statute*, an Incumbent on a Benefice with Cure, *corruptly Resigning or Exchanging*, or who shall take any Thing to resign or exchange, both the Giver and Taker loses double one Year's Value of the Benefice.

As to that Paragraph concerning *Admissions* for any Reward, Sir *Edward Coke* (k) tells us, he was a Member of that Parliament wherein this Act was made, and that the Clause was inserted to prevent hasty Admissions, to the Prejudice of the Patron, by putting him to recover his Right by Law.

But now, if any Reward is taken more than the usual Fee for Admissions, the Church shall be void as to the Patron, without any Sentence of Deprivation, and he may present the same Clerk again; for the Clause doth not bring any Disability upon him, nor is he bound to stay till the Clerk is deprived by a judicial Sentence.

As to the other Paragraph concerning *corruptly Exchanging*, &c. Sir *Simon Degg* gives this Instance, *viz.* If Two Clergymen agree to exchange Livings, and one promiseth his Patron that if he will present the other, he shall demise the Tythes to him at such a Rent, this is Simony, if the Lease is afterwards made pursuant to that Agreement, tho' the Lessor was not privy to it when it was made.

I shall only mention, that long before this Act was made, *viz.* Anno 6 Ed. 6. there was another passed both Houses against Simony, and particularly against granting Presentations whilst

(g) March. 158. (h) Sid. 221. (i) 2 Brownl. 7. (k) 3 Inst. 155.

the Incumbent was yet alive, but it never passed the Royal Assent: If such a Clause had been inserted in the Act 31 *Elizabeth*. it might have prevented many Simoniackal Contracts which have since happened.

And as all corrupt *exchanging* Benefices, so likewise all corrupt *Resignations* are prohibited by this *Statute*.

'Tis true, in an Action of Debt on a Bond (1) the Defendant pleaded, that the Money was paid for the Resignation of a Church, to the Intent that another might be presented, and averred that both the Clerk and Patron, who were Parties to the Bond, were likewise Parties to the Agreement; yet the Bond was held good, because Simony was not an Offence at Common Law, nor any Contract or Bond made void by the *Statute*; and that the Defendant ought not to aver that the Money was to be paid for any other Cause than what was expressed in the Obligation.

Upon the whole Matter, a Presentation upon a Simoniackal Agreement is void, as to all manner of Persons who have any Interest in the Benefice.

'Tis void as to the Patron, who is to lose his Right of Patronage *pro hac vice*; for that is vested in the Queen, and she may present without any Sentence of Deprivation.

'Tis void as to the Ordinary; for he is bound to admit the Queen's Presentee, and no Lapse can incur where the Right of Presentation is vested in Her; but if the Patron was not privy to the Simony, and the Clerk is only *Simoniackus*; there the Ordinary cannot collate by Lapse, till after Six Months Notice given to the Patron.

'Tis void as to the Clerk, without a Declaratory Sentence, tho' he was not privy to it; for he was *Simoniack Promotus*, tho' he was not *Simoniackus* himself; and in such Case he is disabled to hold the Benefice, which was gotten by that Means; but if he had been privy to the * Simony, then he is made for ever incapable to hold any spiritual Promotion; and tho' the Queen should present him to the same Benefice with a *non obstante* to the Simony, or if she Pardon it; yet he can have no Title, because she cannot enable him whom an Act of Parliament hath disabled, and the Pardon only discharges the Punishment as to the Forfeiture of the double Value, and can never enure to settle him in a Benefice, which was not full of him by reason of the Simony.

'Tis void also as to the Parishioners; for if the Parson sues for Tythes, they may plead that he is not Incumbent, for he hath no Right to the Profits, from the Time the Church became void, nor at any Time; but all those are due to the Clerk whom the Queen should present, even from the Time of the Avoidance, because the preceeding Clerk being inducted upon

(1) Moor 564. * 1 Rol. Rep. 237.

a Simoniackal Presentation, the Church was never full of him, but it still remained void by Virtue of this *Statute*.

And if the Queen should not present during the Life of the Simoniack, but he dies Incumbent, and then the true Patron Presents; his Clerk thus presented and admitted will be entitled to all Profits since the last Avoidance by the Death of the legal Incumbent.

Before the *Statute of W. 1. cap. 16.* the Queen might remove the Patron's Clerk, and in such Case her Presentee could claim only the Profits from his Institution; but now, since this *Statute of 31 Eliz.* if the Person who was promoted by Simony should die Incumbent, his Offence shall not be Prejudicial either to a Patron who was not Privy to it, or to his Clerk upon Pretence of a Lapse, or otherwise howsoever, unless the Patron or the Clerk were convicted of Simony in the Life-time of such Incumbent.

And by the same *Statute* Leases made *Bona fide* by a Person who came in by Simony to any Lessee for a valuable Consideration, and who is not Privy to it, or had any Notice thereof shall not be avoided.

'Tis to be observed, that where a Patron Presents who is not Privy to the Simony of his Clerk, he need not be named in the *Quare Impedit*, (m) as for Instance, if the Clerk contracts with a Friend or Relation of the Grantee of the next Avoidance, and thereupon gets the Presentation, the Queen may Declare against the Ordinary and the Incumbent, for the Patron's Title is not in Question, he had the Benefit of his Presentation; 'tis the Clerk who is the Offender, and he ought to be removed.

I shall conclude this Title with the Oath against Simony, viz. *I P. S. do Swear that I have made no Simoniackal Payment, Contract, or Promise, directly, or indirectly by my self, or by any other to my Knowledge, or with my Consent to any Person whatsoever for or concerning the procuring or obtaining the Rectory of H. in the Dioecess of C. nor will at any Time hereafter perform or satisfy any such kind of Payment, Contract, or Promise made by any other without my Knowledge or Consent, so help me God, &c.*

The late Bishop of Worcester was of Opinion, that this Oath hath no Relation to the *Statute 31 Eliz.* because it was in being before that Act was made, and therefore that a Simoniackal Contract ought to be interpreted by the Ecclesiastical Law.

This deserves no other answer than what he hath given himself in another Place, where he tells us, that if the word Simony had been in the *Statute*, the Judges might interpret what it was, for they are the Expositors of our Laws, and since 'tis plainly to be seen in that Act, therefore the Courts at *Westmin-*

ter may determine what Simony is, and what Contracts will amount to it.

Suffragans. See Bishops.

THE word properly signifies all the Provincial Bishops which are under a Metropolitan, and they are called his Suffragans, because he had Power to call them to his Provincial Synods to give their Suffrages there.

The *Chorepiscopi* had been long set aside, who had been for many Ages rural Bishops, of which I shall give this short account.

The Bishop, who was the Supreme of the whole Diocese in Ecclesiastical Affairs, did generally reside in the City with his Presbyters, and when disabled by old Age, or any other Infirmary to inspect and govern the Church, he usually chose a Coadjutor to assist him, and this Person often succeeded him in the Bishoprick.

Afterwards when Christianity spread it self into many Towns and Villages at a great Distance from the City, and the Number of the converted Heathens daily encreased, it was thought fit to choose another Assistant, who was called *Chorepiscopus*, or a Country Bishop, as the word it self Imports, who was really a Bishop in Order, and not a meer Presbyter.

'Tis true, he was inferior to the City Bishop, however his Ordination by one Bishop alone was valid; but still he was a Bishop, and his Office was to enquire into the Behaviour and Morals of the Country Clergy, and to see that no Persons but such who were duly qualified, should be let into the Ministry.

They had Power to Confirm in Country Churches, and to Sit and Vote in Councils in their own Names; they might Ordain Readers and Sub-Deacons, but not Presbyters and Deacons without the Bishop's License.

But by the Council of *Laodicea* their Power was diminished; for it was decreed by that Council, that Bishops should not be in Country Villages, but visiting Presbyters should be in their Room.

However their Power was not suppressed at once, it did sink by Degrees, and afterwards in the Ninth Century it came to nothing; and then it was pretended they were not Bishops, but Presbyters, and so the whole Order was set aside in the Western Church.

In the very beginning of the Reformation here, viz. *An. 26 H. 8. cap. 14.* An Act passed to restore this Order of Men under the Name of Suffragan Bishops; the Preamble recites, that good Laws had been made for electing and consecrating Archbishops and Bishops, but no Provision was made for *Suffragans* which had been accustomed here for the more speedy Administration of the Sacraments, and other devout Things, &c. therefore it was

was enacted that the Places following should be the Sees of Bishops Suffragans.

Bedford, Berwick, Bridgwater, Bristol, Cambridge, Colchester, Dover, St. German, Giltford, Gloucester, Grantham, Hull, Huntingdon, Isle of Wight, Ipswich, Leicester, Marlborough, Moulton, Nottingham, Penrith, Southampton, Shafisbury, Shrewsbury, Taunton, Thetford.

That the Bishop of each Diocess shall by Petition Present Two Persons to the King, whereof he shall allow one to be the Suffragan, and thereupon direct his Mandate to the Archbishop to Consecrate him, which was to be done after this manner ; First it recites that the Bishop, having informed the King that he wanted a Suffragan, had therefore presented Two Persons to him who were qualified for that Office, praying that the King would nominate one of them, thereupon he nominated P. S. being one of the Persons presented, to be Suffragan of the See of Ipswich, requiring the Archbishop to Consecrate him.

The Bishop thus consecrated was to have no greater Authority than what was limited to him by Commission from the Bishop of the Diocess, and was to last no longer.

'Tis true, this Act was repealed by 1 & 2 Phil. Mar. cap. 8. but it was revived by 1 Eliz. 1. tho' never put in Practice since that Time.

Sine Cure.

THESE are Benefices presentable, but, because Vicaridges are endowed in the same Places, the Persons, who enjoy those Sine Cures, have by long Custom been excused from Residence, which is the most can be said for them.

This was the Opinion of the late Bishop of Worcester, but it needs some Explanation.

Generally wherever there is a Sine Cure there must be Two Incumbents, the one is a Rector, the other a Vicar, and they are both equally instituted *ad curam animarum*, the one *Habitualiter*, the other *Actualiter*, that is, the Rectors are not obliged, either to Duty or Residence, but the whole Cure of the Parish is by Custom devolved on the Vicar, so that the Rectories of such Parishes are those which are commonly called Sine Cures.

And as these Cures are presentable, so they must be resigned to the Ordinary, and whatever hath been alledged relating to other Benefices is applicable to them ; only if such Rectories are Donative as some of them are, they may be more properly called Sine Cures, than when the Incumbent comes in by Institution ; for, notwithstanding the Distinction above-mentioned, I cannot See how a Man, who is really instituted *ad curam animarum*, and hath taken upon him that Cure, can be

said

said to have it only *habitualiter*, so as to make his Benefice a Sine Cure.

Synods and Synodals.

THIS is a Meeting of Ecclesiastical Persons for the Causes of Religion; and it comprehends the Provincial Synods of every Metropolitan, and the Diocesane of every Bishop within their Limits.

And these are not of that Authority as General Councils, nor do their Canons oblige the whole Christian Church; but only that Nation where they were made; but if such Canons are agreeable with the Scriptures, and confirmed by General Councils, they are in force every where.

I shall not make a large Discourse of these Assemblies, because they are now almost disused, and therefore shall only acquaint the Reader that the most famous Councils have been held at *Africa, Britain, France, Germany, Italy, Spain.*

It would make a very large Volume to treat particularly of those Synods which have been held in each of those Places, therefore I shall confine my self to those which were assembled here in *Britain*; and as to that Matter, I find that a Synod was held here at *Winchester*, in the Time of King *Edgar*, in which Archbishop *Dunstan* was President; and the Monkish Historians of that Synod tells us, that a Wooden Cross did then speak against the Marriage of Priests, which probably might have a greater Effect upon them against that State of Life, in those credulous and superstitious Times, than all the Wooden Arguments that Archbishop, or any of his Chaplains could bring against it.

There was another held at *Oxford*, wherein Archbishop *Langton* was President, who divided the Bible into Chapters; and in this Synod many Constitutions were made for the better Government of the Church.

Another at *Clarendon* under Archbishop *Becket*, in the Reign of *Hen. 2.* in which some Decrees were made concerning the Prerogatives of the Crown, and the Privileges of the Clergy.

Two in the Reign of *Edm. 6.* In the one the 39 Articles were confirmed; and in the other the *English* Liturgy was composed by Seven Bishops, and Four Doctors of Divinity.

And here I cannot but take Notice that Provincial Synods were to be held twice in every Year; this appears by the Apostolical Canons, and likewise by those made in the Council of *Nice*.

But this being found too hard a Task for Bishops, who were usually Men in Years, especially where the Provinces were large, it was disused about the Middle of the Fifth Century; so that some Canons were made for Synods to be held once in a Year; but not abrogating the ancient Custom to hold them oftner, and this continued for many Ages, but at last this came in

in like manner to be neglected, and thereupon, about the Middle of the Fourteenth Century, another Canon was made in the Council of *Basil*, for a Triennial Synod of all the Bishops of every Province; and in the same Council there was another Canon for every Bishop to hold a Diocesan Synod once in a Year.

And even here in *Britain*, by the ancient Constitution of this Church, a Synod was to be held once a Year, which is now discontinued, and thus the Authority of examining things thro' the Province devolved on the Archbishop.

In a Diocesan Synod the Bishop always presided, and he usually Summoned *Septem a plebe* in every Parish in his Diocese, to whom he administered an Oath to enquire into the state and condition of each Parish relating to Ecclesiastical Affairs, which were called *Testes Synodales*, and these Men made their presentments in Writing, or *viva Voce* in the Synod.

And at these meetings there was a pecuniary Tribute paid by the inferior Clergy to the Bishop, which is called a Synodal, because it was usually paid at those Synods, but not always; for it was paid likewise at *Christmas* and *Easter*, and sometimes at the Bishops Visitations; and it differs from Procurations, for those are Pensions, but Synodals are Census or Tributes.

This Tribute was afterwards demanded by Archdeacons and Deans, not *jure Communi Ecclesiastico*, but by composition between the Bishop and them; and since Synods have been discontinued, this Tribute is usually paid to them at Visitations, and claimed by Archdeacons for their *Easter* Visitations; it seems to be a Contribution towards their Charges in Synods, for they were Elected by the Deacons, and were their Representatives at such Assemblies.

'Tis now become a Church Due, of which the Act of 34 *H. 8. cap. 19.* takes notice, and provides for the recovering it, where 'tis denied or neglected to be paid, and 'tis reasonable it should be so, because 'tis valued in the Queen's Books, and She receives a yearly Tenth out of it.

And if it had not been for this Act, some are of Opinion, that where Rectories are impropriate, there had been no Remedy to recover Synodals, which was usually done in the Spiritual Court; but, now such Rectories being made *Lay-fee*s by the *Impropriation*, those Courts have no Jurisdiction in such Cases, if it had not been otherwise provided by that Law.

The Act sets forth, *That Synodals due out of Religious Houses dissolved shall be paid to Bishops and Archdeacons, by the Occupiers of those very Lands, if Ecclesiastical Persons were seized thereof within 10 Years before their Dissolution; and if in Suits in the Spiritual Court the Defendants shall be Convicted, the Plaintiff shall recover the Value thereof in Damages, together with Costs of Suit; the like*
be

he shall recover at Common Law, when the Cause is determinable there. And from hence some infer, that Synodals are due by Act of Parliament, and not *ratione Visitationis*.

Tythes.

TYTHES being the great and legal Support of the Clergy, I shall be the more particular in treating thereof; and first I shall give an Historial account of the Right which they have to receive them.

We are directed by Reason to offer something to God, as an Acknowledgment of his Blessings, from whom we receive all that is good.

I know 'tis objected, that his Dominion over the whole is so universal and extensive, that it may seem absurd to offer him any Part; but yet the Scripture it self Commands us to Honour him with our Riches, and with the First Fruits of our Increase; and by the *Mosaical Law* the People were commanded to bring the First Fruits of their Land into the House of their God; and after they had Possession of the Land of *Canaan*, they were commanded to bring to the Priest the first of all the Fruits of the Earth, in a Basket, as an Acknowledgment that they enjoyed that Land by the Gift of God.

The proportionable Part (that is, the Tenth) was paid by Two Patriarchs long before the Law; for *Abraham* paid to *Melchisedeck*, not only the Tythes of the Spoils which he brought in his return from the Slaughter of his Enemies, (a) but the Tythes of all Things, and these were paid to him as a Priest, for such he was, and of the most High God, and it was in that Capacity, and not of a King, that he met *Abraham*, for he was not assisting him in the Wars, but met him as he returned with Victory.

After *Abraham's* Death, the Patriarch *Jacob* made a Solemn Vow to return unto God the Tenth of all which he should bestow on him, and 'tis probable, that being himself *Abraham's* Grandson, he had observed what was done by him, and therefore fixed on the Tenth rather than on any other part.

The *Jews*, who were the Posterity of the Patriarchs, were told by *Moses*, that all the Tythes of the Land were the Lord's, not in the literal Sense, but as they were devoted and due to God, who assigned his Right to the Levites in these Words, *viz. I have given the Children of Levi all the Tents in Israel.*

'Tis true, the *Jews* paid more than the Tenth to the very Time of the Destruction of the Temple; but before the *Mosaick Law* the just Tenth Part was paid by the Patriarchs, and in Conformity to that Proportion the Tenth was paid to the *Levites under the Law*, which was called the first Tything; and

(a) Heb. 7. 2.

this was accounted an Inheritance which was to continue for ever, after the other Tythes, superadded by that Law, were abolished with it, such was the leaving one Corner of the Field unreaped, amounting to a Sixtieth Part, the offering the First Fruits, the redeeming the first Born both of Man and Beast.

Therefore this Proportion being paid by the inspired Patriarchs, it became a settled Provision for the Levitical Priesthood, and was universally paid even by the Heathens themselves, who derived this Custom from them by Tradition, and not from any positive Law of *Moses*; for, in Imitation of such Payment made by *Abraham*, they paid Tythes of Spoils to their Kings, or chief Magistrates, which was never done by the *Jews*, and this was not only Voluntary, but it was of the Best, and it was from thence that *Edecumata* signified the chiefest Thing, and *Fluctus Decumanus* the highest Wave.

It was a Proportion agreeable to the Reason of the greatest part of Mankind, and it being generally paid by the Gentiles when our Saviour was Born, there seems to be no occasion of any positive or express command in the Gospel for this Payment, because both *Jews* and *Gentiles* were agreed in it before.

However, we have some Intimations of it there, for what else can be the Intention of *rendering unto God, the Things which are God's*? which the Fathers interpret to be Tythes, First Fruits and Oblations, for no Man can think it was meant Literally.

Besides, our Saviour himself speaks of tything Mint, Annise and Cummin, and he appointed a (b) Maintenance for the Ministers of his Gospel, which could not be less than than a Tenth Part, because a meaner Priesthood had so much before he was Born, and another reason may be, because the Christian Priests were commanded to be Hospitable, which could not well be with a smaller Proportion.

'Tis true, the Apostle expresses himself indefinitely to his *Corinthians*, viz. *That they who Preach the Gospel should live by it*, but this livelihood must certainly be the Tenth Part, because it was to be like that of the *Jewish* Priests and Levites, and this appears by the best Expositors of that Text.

But the meaning is plain without an Exposition, and this out of the whole Frame and Contexture of the Words themselves, and the Verses relating to this Matter.

Do you not know that the Levites who Minister about Holy Things live of Tythes, and that the Priests who wait at the Altar are Partakers of the Oblations and Sacrifices? The Similitude follows, *Even so hath the Lord ordained that the Christian Priests who Preach the Gospel should live of the Gospel*, that is, they should live of what is devoted to Christ, as an Acknowledgment to him for his Gospel.

(b) 1 Cor. Cap. 9, 13, 14.

So likewise the Apostle, writing to the * *Galatians*, enjoins 'em who are taught in the Word, to give some part of their Temporal Goods to the Teacher; 'tis true, he doth not Name the Tenth Part in *Terminis*, for it was generally observed throughout the World, and therefore there was no occasion to be particular in it, especially since that part was set aside for this purpose from the beginning of Time, and approved by God himself.

I admit, that those Tythes which belonged to the Priests and Levites were abolished with the Sacrifices; and that our Saviour, having instituted a new Form of Ministry, appointed a new way to provide against their Necessities, and this was by Charity, and the Oblations of Believers, which were usually given by them after the Communion; and the Church had no other stated Revenues till the Reign of *Constantine* in the Fourth Century, who permitted Churchmen to be endowed with Lands and Inheritances; which made *St. Jerome* observe, that the Church was then more powerful and rich, but less vertuous under Christian Princes.

But I shall insist no longer upon this, and shall but just mention what was done by the Primitive Christians in relation to this Matter, and so proceed to shew when Tythes were paid here among us.

And first I must answer that Objection which is usually made, that Tythes were not paid till about the end of the first 400 Years after Christ, and that there was not any Canon made in the *African* Councils for such Payment.

'Tis true, there might be no stated or regular Payment at that Time, because the Church was then under Persecution; but if the Christians in the beginning gave more than the Tenth, as certainly they did, then there could be no occasion for a Canon to enjoin them to pay it.

And 'tis plain they gave more, for they sold their Possessions, and brought the Money into the common Treasury of the Church. † *Tertullian* tells us, that all Things were in common among them, but their Wives, and not only the Money which was raised by the Sale of their Estates, but they made Oblations every Week, or at farthest every Month, to the Church. And we are told by *St. Cyprian*, that even those Offerings were answerable to the Levites Tenth, from whence we may infer, that Tythes were paid at that Time.

But soon after Kings and Princes were converted to Christianity, and the Church began to be settled, we have plain Proofs of the Payment of Tythes.

Among us here in *England*, 'tis probable that Tythes were paid by our *Saxon* Ancestors, as soon as they were converted from Heathenism; for King *Essebert* made a Law against

* Gal. 6. 6. † Apolog. cap. 39.

taking away *Res Ecclesiæ*, which they call'd God's Fees; but this was not a general Law to oblige the whole Nation, because *Ethelbert* was only King of *Kent*; and the Laws of King *Ina* long before that Time enjoin the Payment of Church-Shot. And several other *Saxon* Kings made Laws that the Church should have its Revenue, and that the Clergy should have the First-Fruits; all which may be expounded of Tythes, because they were paid to the Church.

This appears by the Practice of *Eadbert*, who was Bishop of *Landisfarne*, in the beginning of King *Ina's* Reign; 'tis true, he could pay no Tythes himself, because he was a Clergyman, and therefore he gave them every Year to the Poor.

About 5c Years after him, *Boniface*, Bishop of *Mentz*, wrote an Epistle to *Cuthbert*, Archbishop of *Canterbury*, wherein he expressly mentions Tythes, as usually paid in those Days; and in Archbishop *Egbert's* Canons, which were collected by him in the Year 1750. we read of Priests who were commanded to Teach the People to pay Tythes; that the Receiver was to register the Names of such as paid, and that no Man should take them from ancient Churches, nor any Secular Service be done for them.

But it was above 30 Years afterwards that the first Canon was made here for the Payment of Tythes, and that was in the Synod of *Calcuith*, which was held here in the Reign of King *Offa*, enjoining the Payment of Tythes according to the Scriptures, and exhorting all Men to pay the same, because 'tis the special Command of God himself.

'Tis likewise true, that in Obedience to these and other Canons, Tythes were paid here in some particular Places; but King *Ethelwolp*, who was the first Hereditary Monarch of the English Saxons, made a voluntary Donation of Tythes to be paid throughout the Kingdom; and this was done in a General Council, with the free Consent of the Spiritual and Temporal Lords, and a multitude of other People; and 'tis for that reason that some ancient Writers tell us, that the Tenth Part was granted a *Rege Baronibus & Populo*; but that must be a Mistake, because all the Lands in *England* were then Demesnes of that King alone, and therefore when he granted *decimam partem terræ meæ*, that must be the Tenth of the Profits of the Lands throughout the Kingdom; and lest *decima mansio* (which is likewise in the Grant) should be otherwise understood, *Simeon* of *Durham* and *Malmesbury* tell us, that King *decimam regni sui partem Ecclesiæ divisit*; which Division and Grant was confirmed by many of his Successors, even to the Time of *Edward* the Confessor, who made a Law, that the Tenth of all Corn shall be paid to God, as due to him, and tells us in what manner both Prædial and Personal Tythes ought to be paid; and that if any Person should disobey that Law, he should be compelled to pay this Duty by the King and the Bishop, and thus it stood till the Conquest. It

It would be very tedious to mention all the Canons and Constitutions which were made in Provincial Synods in the Reigns of the *Norman Kings* relating to this purpose, therefore I shall only shew that Tythes were paid here long before the Parochial Right was fixed, which some would have to be a little before the *Lateran Council*, Anno 1215. but that must be a Mistake, for Pope *Adrian IV.* decreed the Monks of *Boxley* to pay Parochial Tythes, as fully as had been paid before they came into that Parish, which was in the Year 1144. and that was above 70 Years before that Council was held; (a) for then that Abby was founded.

'Tis probable that Parochial Tythes were more strictly paid to the Secular Clergy for some Time after that Council than before, because they could not be otherwise disposed of or appropriated at that Time to any other Uses, even with the Bishop's Consent.

But about 15 Years afterwards, when the Monks found that the Pope and the Bishops began to appropriate several Tythes to Monasteries, which they had taken from the Secular Clergy, then the Schoolmen, and particularly *Alexander of Hales*, who was a Monk himself, invented a Doctrine to justify such Proceedings, and that was by asserting a Competency to be due to the Clergy by the Laws of God, but that the Tenth Part was instituted by the Church in meer Condescension to the Laity, intimating that they ought to pay a Tenth to the Rectors, but a great deal more to the Fryars.

If this Doctrine had been true, it might have justified those Monks in possessing a great part of the Parochial Tythes, and assigning a small Portion to the Vicars as a *competens beneficium* to officiate in Churches.

But it was invented by them out of a base and covetous Design; it destroyed that Doctrine which had been received among Christians for many Ages; and though *Erasmus* himself and some other great Men were inclined to this new Opinion of the Schoolmen, yet he was certainly of another Mind when he was inducted into a Parsonage in *Kem*, and received Tythes there.

I shall now proceed to the Reign of *H. 8.* who confirmed those Canons relating to Tythes, which were made in the Reigns of his Predecessors; this he did * after he renounced the Pope's Supremacy by a particular (b) Statute made for that purpose; and by which it was enacted, *That Tythes should be paid according to the Ecclesiastical Laws of the Church of England, and according to the Customs in every Parish where they shall grow due; and the reason is given in the Purview of the Act, viz. because they are due to God and his Holy Church.*

(a) *Dudg. Mon. Fol. 827.* * Anno 1536. (b) 27 Hen. 8. cap. 20.

And 'tis to be observed, that before Laymen had any Grants of Monastery-Lands to hold them discharged of Tythes, in the same manner as they were held before the Dissolution, care was taken to alienate the Tythes of those Lands, by the Consent of the Bishop, and that due Payment might be made thereof to the Parochial Rectors.

Thus it appears, that Tythes were paid by the inspired Patriarchs, that such Payment was likewise enjoined under the *Mosaical* Dispensation, and not repealed by the Gospel; that the ancient Fathers held them due to the Church, and that they were constantly paid in the first Ages of Christianity, and here in *England* as soon as our *Saxon* Ancestors were converted from Heathenism, and this in Obedience to the peculiar Laws of God; but when Christians became cold in their Devotion, then the Payment was enforced by Temporal Laws; till afterwards, by the free and voluntary Donation of King *Ethelwolph*, who had all the Lands in *England* in Demesne, and by a kind of Parliamentary Consent of that Time, (as Mr. *Selden* calls it) they were for ever dedicated to the Church; and this hath since been confirmed, not only by Canons, but by several Statutes, and particularly by *Magna Charta*, and the Clergy have enjoined them by Virtue of those Laws 800 Years and upwards, so that 'tis now a peculiar Estate vested in them, and distinct from the Inheritance of the other Nine Parts, and they have as good, if not a better Right to it, than any Layman hath to his Estate, if such a Right can be acquired by a voluntary Donation, and be established by a long and continued Possession, and confirmed by many Acts of Parliament, as certainly it may.

Having said thus much for the Civil Right of Tythes, I shall in the next Place give an Account of the Definition of the Word, and then shew how 'tis divided.

Tythe is a Tenth Part in Propriety of Speech, or something in lieu thereof, yearly arising out of the Encrease or Profits of Land or Stock, or raised by the Industry of the Parishioner.

And agreeable to this Definition, the common Lawyers divide it into Three Partes:

1. *Prædial*. Which arises meerly from the Ground, as the Fruits thereof, viz. all sorts of Grain, Hay, Underwood, Fruits of Trees, as Acorns, Apples, Cherries, &c. also Hops, Saffron, Hemp, Flax; Garden-Herbs, as Parsley, Mint, &c.

2. *Mix'd*. Which arise from Cattle nourished by the Ground, as Colts, Calves, Lambs, &c. Milk, Cheese, Eggs, Chicken, Geese, &c.

3. *Personal*. Which arise from the Labour and Industry of Men using any Merchandize or Manual Occupation; and this is the Tenth Part of their clear Gain, the Charges and Expences being first deducted, 1 *Roll. Abr.* 656. *Plito* 1.

There-

Therefore if an Owner of a Ship lend it to Mariners to carry on the Fishing-Trade, who agree to pay a certain quantity of Fish for the Hire of the Ship, no Tythe shall be paid of these Fish, because 'tis a Personal Tythe, and ought to be paid out of the clear Gain.

[To whom due.] These Tythes, be they of what Nature they will, are properly due to the Clergy, who have the Cure of Souls, and are to be paid to them in the Parishes where they arise.

But yet in some Cases the Parson of one Parish may prescribe to have a Portion of Tythes arising in another Parish; this is where the Abbots and Priors had such Portions before their Houses were dissolved, in such case the Impropriators may claim them now, and the Usage since the Dissolution is an Evidence how it was before.

'Tis commonly said, that before the Council of *Lateran* it was lawful for any Man to give or pay Tythes to what Church he pleased; and if so, this may be the Original of that which is now called a *Portion of Tythes*; and this where one Clergyman hath a Right to certain Tythes in gross, not in his own Parish, but in the Parish of another, for such a Portion of Tythes is not by intendment of Law any Parcel of the Tythes of his proper Rectory or Vicaridge; and so it was adjudged in ** Bozouns's Case*, viz. The Queen granted *totam illam portionem decimarum in Longham, &c.* the Tythes of the Rectory of *Longham* did not pass.

And as Tythes are due to the Clergy, so a Layman was not capable of them *in prebend*; but in some particular Cases, as for instance, † Lord of a Mannor prescribed to pay to the Parson of *H.* in whose Parish his Mannor was, so much in satisfaction of all Tythes arising in the said Mannor; and that in consideration thereof, he and all those, whose Estate he had therein, enjoyed all the Tythes there, this was held a good Prescription.

But since the Statute of Dissolution of Monasteries, the Tythes which were appropriated to those Religious Houses are made a Lay-Fee, and many Laymen are capable to have them *in pernaney*, and may sue for them in the Ecclesiastical Court.

[Due of what Tythes arise.] 'Tis regularly true, that Tythes are to be paid of Things encreasing Annually *simul & semel*; and therefore my Lord Coke affirms, that they are not to be paid of *Minerals*, nor of *Chalk, Lead, Slate, Stone, Tin, Turfs, &c.* But this Rule is to be understood where there is no Custom to the contrary; for if this Rule should be true, then no Tythes could be paid of Houses; for a House which is built doth not yearly encrease, nor of After-Pasture, because it must not be only *simul* but *semel*.

So Things which are *feræ naturæ* are not Titheable, but some Questions have been made what these are, for Bees, Pidgeons, Rabbits, which are kept under Custody, cannot properly be said to be *feræ naturæ*, for they are a Man's Property.

But some Things which are *feræ naturæ*, and under no manner of Custody, may be Tytheable by Custom, as Fish in the Sea when caught; from whence the Bishop of Worcester reflects upon the force of Custom, which can reduce Things *feræ naturæ* to the same Condition with tame Creatures; but he tells us, that the Notion of their being *feræ naturæ* served only as an Excuse where the Custom of paying Tythes for them was not continued; and that where it was beyond dispute, then that Notion prevailed, that they were due only by Custom: But he affirms, that they were Tytheable as other Things; and he mentions, that in several ancient * Appropriations the Tythes of those Things were expressly given to the Monasteries.

How to be set out. The Nine Parts of Prædial Tythes are to be set out in the Presence of the Parson or his Servant upon Notice given, but this is by Virtue of the Canon Law, which was never received here; for by the Common Law * Notice is not requisite, and so it was adjudged between *Chase and Ware*, 1 Rol. Abr. 643. Plito 1.

If several Persons have a Right to the Tythes of a Parish, the Tenth Part is only to be set out, for the Parishioners are not bound to subdivide the same into Moieties, according to the Proportion of the several Proprietors.

If I set out the Tythes, and afterwards privately take them away, this is a Fraud; and because the Statute provides, that they shall be set forth without Fraud or Deceit, therefore this cannot be intended a setting forth within the Statute, but the Party shall be punished by treble the † Value.

But when the Tythes are once set out and the Parson neglects to carry them away, in such case the Owner or Farmer of the Ground must give Notice to the Parson, that his Tythes are set out before he can put his Cattle in, or sue him for not taking away the Tythes.

However, the Parson (a) is not to be obstructed in carrying them away; for if the Owner, &c. will not let him or his Servants come the usual Way, then, tho' the Tythes are set out, 'tis a fraudulent setting them out, because it appears to be with an Intention to hinder the Parson from taking them away; and if a Question should arise, which is the usual Way, this shall be tried in the || Spiritual Court, because the Way is only necessary to the Tythes, which are of * Ecclesiastical Cognizance; but he cannot be hindered from coming the usual Way to the Ground, to see his Tythes duly set out.

* 2 Vent. 48. † 1 Brownl. 34. 2 Brownl. 2. (a) 1 Bulst. 108. || Jones 230. * 1 Rol. Rep. 420.

So if the Gate is locked where the Tythes are after they are set out, this shall be tried in the Spiritual Court, for the reason before-mentioned.

I now come to the particular Things for which Tythes are to be paid, and for which not; and to proceed in an Alphabetical manner, I will begin with *Abby-Lands*.

Abby-Land.] At the Time of the Dissolution of Abbies (b) they were distinguished into the greater and less, the one were above 200 l. *per Annum*, and the other were under that yearly Value.

Now, when the greater were dissolved by the Statute 31 H. 8. cap. 8. it was enacted, *That the King and his Grantees should enjoy those Lands discharged of Tythes in as ample manner as the Abbots held them before that Time*; but the Lands of the lesser Monasteries, which were dissolved by the Statute 27 H. 8. are not within the Benefit of the Act 31 H. 8. and therefore since the Dissolution these Lands pays Tythes, tho' they paid none whilst in the Hands of the Abbots, &c. for their Privileges, being Personal, were extinguished by that Statute 27 H. 8.

And therefore where an * Abbot held Lands discharged from Payment of Tythes, and afterwards alienated the same to a Layman, he shall pay Tythes, because it shall be intended a personal + Prescription whilst in the Hands of the Abbot, and not a real Composition.

Acrons.] Shall pay Tythes, because (c) they encrease every Year; but then they must be gathered and sold, for if they drop and Hogs eat them, no Tythes are to be paid.

Aftermoath.] There have been various and contradictory Opinions concerning Tythes of *Aftermoaths*; my Lord Coke (d) in his Exposition of the Statute 2 Ed. 6. tells us, that Tythes shall not be paid of it, for 'tis freed by the Common Law and Customs of the Realm; I suppose he means by the general Custom, because in some particular Places it may be due by Custom.

But Serjeant Rolls (e) tells us, that such Tythes are due *de jure*, and therefore there must be either a Custom or Prescription to discharge them, viz. in consideration of making the Tythes of the first Moath into Hay (f) at the Charge of the Parishioner, he had been discharged of the *Aftermoath*, this hath been held a good *Modus*.

But I take it to be the better Opinion, that such Tythes are not due *de jure*, because 'tis against the Rule *de annuatim renovantibus simul & semel*; and where-ever 'tis demanded, if it appear, upon the pleading, that the Owner was at greater Charge

(b) 2 Cro. 607. Jones 2. * 1 Lev. 185. Sid. 320. + Cro. Car. 423. (c) Moor 762. Het. 27. Lit. Rep. 40. 1 Rol. Abr. 640. Q. 10. (d) 2 Ed. 6. cap. 13. 2 Inst. 652. (e) 1 Rol. Abr. 640. (f) 1 Rol. Abr. 648. Hob. 250.

and Labour than what the Laws appoint in preparing the first Crop for the Benefit of the Parson, the Land shall be discharged from the Payment of *Tythes* of the second Crop; (g) as for instance, in a Suit of *Tythes* of the *Aftermoath*, the Defendant pleaded, that he, at his own Costs, tedded the Grass, and then spread it and gathered it into Cocks, or that he carried it to the Parson's Barn; in such case, because the Parson had the Benefit of the Parishioners Labour, it shall be a good Discharge for the *Tythes* of the *Aftermoath*.

So if the Defendant suggests a Custom in a Parish, that the Parishioner is to cut the Grass and make it into Cocks, and set out the Tenth for the Parson, (h) which he hath used to accept in satisfaction of the first and second Vesture, this is a good Prescription.

And in a *Norfolk* Cause by the * Vicar of *Scotow*, the Court was of Opinion, that there was no difference between the *Aftermoaths* of *Clover-grass* and other ordinary *Grass* in the Point of *Tythes*.

But *Tythes* may be due for *Aftermoath* by Custom; and † Sir *Simon Degg* expressly affirms, that if a Meadow is so rich that it yields Two Crops, the Parson shall have *Tythes* of both; but this must be by Virtue of some Custom, because 'tis against the known Rule above-mentioned.

Agistment.] This is taking to Pasture the Cattle of other Men, or depasturing barren Cattle of the Owner.

In the first Case it was formerly held that *Tythes* were not payable, and so is *Fitzherbert* (i) in his *Natura Brevium* expressly.

But now the Law (k) is otherwise; and so far from determining that no *Tythes* are due, that 'tis held they are due *de communi jure*, and 'tis reasonable that it should be so, for otherwise the Owner might feed all his Land with barren Cattle, and so defraud the Parson of his *Tythes*; for no other *Tythe* can be paid of barren Cattle, but according to the Value of the Land, unless Custom hath otherwise determined.

If a Man breeds or buys unprofitable Cattle, and sells them, he shall pay for the Agistment; but if he depasture his Land with his own Saddle-Horses, he shall pay no *Tythes*; (l) if an Inn-keeper puts in the Horses of his Guests, he shall pay for the Agistment, unless he paid *Tythes* for the Hay of the same Land.

If profitable Cattle, as Cows, Oxen, &c. are fed together with Barren, (m) the Owner shall pay *Tythe* in kind for the profitable Cattle, and *Tythe* of the Herbage for the rest.

But if Cattle are bred for the Plough, or the Pail, no *Tythe* ought to be paid for their Pasture, that is, if they are employ-

(g) Moor 758. 1 Rol. Abr. 640. 2 Cro. 42. (h) Moor 910. Cro. Eliz. 660. 1 Rol. Abr. 648. 2 Lut. 1074. 2 Cro. 116. Yel. 86. Hob. 250. * 2 Lut. 1074. † Fol. 155. (i) E. N. B. 58. Lit. 6. (k) Hardres 184. (l) Poph. 142. (m) Degg. 167.

ed for that purpose in the Parish where they were bred, (n) but if the Owner sells them he must pay *Tythes* of the Herbage.

The *Tything* in such case is to be governed by the yearly Rent of the Land; but by the Canon Law 'tis by the Number of Cattle, and the Time of depasturing them in the Parish, according to the Custom of the Place.

If by the yearly Value of the Rent, then 'tis after the rate of 2 s. per Pound, yet the Twentieth Part is generally accepted.

This *Tythe* may be paid by the Owner of the Land or his Tenant; but 'tis certainly due from the * Owner of the Cattle, because they take the Profits of the Soil; but because it may be inconvenient for the Parson to find out the Owner (o) of the Cattle, therefore the Owner of the Land is usually sued.

Th.] Above Twenty Years growth is not *Tytheable*, for 'tis Timber.

Thp.] Is not *Tytheable* for the same reason.

Barb.] Of Timber-Trees is not *Tytheable*, for 'tis privileged by the Body of the Tree.

Barren-Land.] *Tythes* are not due for Land (p) which is naturally barren, and not manurable without some extraordinary Charge; and 'tis in respect of such Charge, and for the Advancement of Husbandry, that if such Land is converted to Tillage, it shall be discharged of *Tythes* for the first + Seven Years after the Improvement.

But Land which is overgrown with Bushes, or become unprofitable by (q) ill Husbandry, or other Accident, cannot be properly said to be Barren-Land, and therefore if 'tis grubbed, or plowed and sowed, it pays *Tythes* immediately.

So likewise (r) Land gained either from fresh Waters by draining, or from the Sea, tho' with great Charge, cannot be called Barren, for 'tis unprofitable only by Accident.

And if the Defendant pleads 'tis Barren, and that Plea is not allowed in the Spiritual Court, a Prohibition will be granted.

Beech.] In some Countries where Timber is scarce (s) Beech is used for Building; and so we are told 'tis in *Buckinghamshire*; and in such case, if above Twenty Years growth, 'tis privileged by the Statute 45 Ed. 3. cap. 3. but 'tis Necessity, and not the Nature of the Tree which makes it Timber, (t) for where-ever other Timber may be had, there Beech is not used for Building and so become *Tytheable*.

Bees.] It hath been a Question, whether any *Tythes* should be paid for Bees *quia animalia sunt volatilia*, or what we call *fera natura*; but 'tis now held, that *Tythes* are to be paid for

(n) 1 Rol. Abr. 646. * Jones 254. Hardres 184. (o) 1 Rol. Abr. 656. (p) 2 Inst. 656. + Prt Stat. 2 Ed. 6. cap. 13. (q) Cro. Eliz. 475. Moor 939. (r) Cro. Eliz. 475. 3 Bulst. 165. Het. 147. 1 Rol. Rep. 354. (s) Moor 541. 1 Brownl. 94. (t) 1 Rol. Abr. 640. 1 Rol. Rep. 355. Moor 841.

them; and 'tis properly a Prædial *Tythe*, which is not paid by the Tenth Swarm, but by the Tenth Measure of Honey, and Tenth Pound of Wax; and a *Modus* (*u*) to pay so much will be a good Discharge to pay the Tenth Swarm, if such a *Tythe* can be due; for it hath been doubted, because Bees are *fera natura*, as before-mentioned; tho' they are so, yet when they are gathered into Hives, they are then under Custody, and *Tytheable* by the Hive or Swarm, tho' the general way is by the Honey and Wax.

Birches.] Are *Tytheable* tho' of above 20 Years growth (*x*) for they are not accounted in Law proper Timber for Building.

Brick.] *Tythes* are not to be paid for Bricks, because they are made of Parcel of the Freehold; and if a Suit should be brought for such *Tythes* (*y*) the Defendant may suggest the general Immunity, and that Bricks are made of Earth, which doth not renew. 2 *Inst.* 651.

Neither shall *Tythe* be paid for Wood, cut for Burning of Bricks, if used either to enlarge or repair the Owner's House; but then it must be suggested that it was for the necessary Habitation of his Family, for otherwise he might build a Castle.

Broom.] *Tythes* are not due for Broom (*z*) used for Fuel in the Parish where it grows.

Calves.] The Tenth Calf is due to the Parson when 'tis weaned, and he is not obliged to take it before; and sometimes the *Tythe* is to be proportioned with respect to the Places where they are engendered, brought fourth and nourished.

But if under the Number of Ten in one Year, the Parson cannot have *Tythes* in kind in that Year, without a special Custom, but may take it so in the next Year, accounting both Years together, or *Tythe pro rata* in the same Year if there is any Custom for it.

But 'tis a good *Modus* to pay one Calf if he hath Seven in one Year; and if under Seven, then an Half-penny for every Calf, for the *Tythes* of all Calves in that Year, and if he sells a Calf to pay the Tenth of the Value, 1 *Rol. Abr.* 648. *Plito* 2.

Cattle.] Those which are bred for the Plough and Pail pay no *Tythe* for their Pasture, because the Parson hath the Benefit of the Labour of Plough-Cattle by Tilling the Ground for Corn, and *Tythe-Milk* for those which are bred for the Pail.

But in the first Case it must be alledged that the Cattle were used to manure the Ground in that very Parish, 2 *Cro.* 575. 1 *Rol. Rep.* 62. 2 *Cro.* 430.

If such Cattle are bred or bought to sell again, and accordingly are sold before they are used, *Tythes* shall be paid for them; but not if he kill and spend them in the House, 1 *Rol. Abr.* 647. *Plito* 13.

If such Cattle are past their Labour, and the Cows are Bar-

(*u*) 1 *Rol. Abr.* 651. *Plito* 15. (*x*) *Moor* 907. (*y*) 2 *Brownl.*
(*z*) *Cro. Eliz.* 609. 1 *Rol. Abr.* 644. ren,

ren, and afterwards fatted in order to sell, they shall pay *Tythes* during the Time they were fattening, for the Reason of the Discharge then ceaseth, 1 *Roll. Abr.* 647. *Plito* 9.

If the Cattle are bred for the Plough, tho' the Owner hath no arable Land in the Parish where they were bred, yet they shall pay *Tythes* where fed, *Hardres* 184.

If a Man sows his Land to feed his Horses used for Tillage, there shall be no *Tythe* paid for such Pasture; but if he keeps Horses to sell, and accordingly sells them, he shall pay *Tythes*.

Cattle feeding on large Wastes, not known to be in any particular Parish, shall pay *Tythes* to the Parson of that Parish where the Owner lives, and if fed in several Parishes, they shall pay *Tythes pro rata*, so as they continue above a Month in each Parish.

But where the manner of Tything barren Cattle is not made certain by Custom, it shall be computed according to the Value of the Land on which they are depastured by the Payment of 2s. per Pound Rent, *Hardres* 35.

Chalk.] Chalk and Chalk-Pits are not Tytheable, because Part of the Freehold.

Cheese.] If the Milk pays Tythes, the Cheese pays none; but it may be a good Prescription to pay the Tenth-Cheese, made between *May* and *August*, for all Tythe-Milk in that Year.

Cherry-Trees.] Cherry-Trees in *Buckinghamshire* have been adjudged Timber, and therefore Tythe-free.

Chicken.] Chicken pay no Tythes, because the Eggs are tithed, 1 *Roll. Abr.* 642. *Plito* 6.

Clay.] Clay is not Tytheable.

Cloathes.] Cloathes fulled in a Fulling-Mill. See *Mill*.

Clover-grass. See *Grass*.

Coals.] Are not Tytheable, therefore a Prescription *de non decimando* as to them is good, 2 *Inst.* 651.

Colts.] The same with Calves.

Conies.] Tythes are not paid for Conies *de jure*, because they are *fera natura*, but by Custom they may become due; but now 'tis generally held, that if they are sold in the Market, and not spent in the House, Tythes ought to be paid for them, and yet they are *fera natura*, let them be spent or sold where they will, 1 *Roll. Abr.* 635. *Plito* 3. *March.* 87. *Hardres* 188. *Her.* 147. *Lit. Rep.* 13.

Corn.] Corn pays a Predial-Tythe, tho' it arises every Year out of the Land, but 'tis by the Labour and Industry of the Husbandman, and it ought of common Right to be cut down by the Owner, and prepared for the Parson, and tithed by the tenth Cock, Sheaf, or Shock; and if the Parishioner refuse to do it, the Parson may sue him in the Spiritual Court; but it must be specially for not setting it out in Cocks, and not generally for not setting out the Tythes, *Latch.* 125. *Sid.* 183.

But

But the Parishioner is not bound to put the Parson's Sheaves into Shocks, unless by Custom, 1 *Rol. Abr.* 644. *Plito.* 6.

If he doth not set out the Tythes, he is liable to be sued in an Action of Debt upon the *Statute* for treble Damages; and if he doth set them out, and afterwards carry them away, the like Action may be brought against him, because the setting out was with a fraudulent Design to cheat the Parson.

But 'tis clear that an Action of Trespas lies against him, or he may be sued in the Spiritual Court; but if a Stranger takes them away, he must be sued in an Action of Trespas at Common Law.

A Prescription to pay the Parson the tenth Sheaf, as it falls out, or the tenth Swarth, is not good, 1 *Rol. Abr.* 643. *Plito.* 6.

But a Prescription to be discharged of Tythes in that Year, wherein the Field was fallow, in Consideration he had set the Sheafs into Shocks when the Field was sowed, this is good, 1 *Rol. Abr.* 649. *Plito.* 4.

Cows.] Cows which are milked pay no Tythe for their Pasture; but if a Man hath but one Cow, and doth not make any Cheese, something ought to be paid, but the Custom of the Place is to be observed. *Custom.* See *Modus*

Anno 8 *W.* a Prescription was alledged, that every Tenant within the Parish of * *Kirkburton* in *Yorkshire* was to pay to the Vicar a Penny-half-penny for a Cow with one Calf, and so to the Number of 5; and for 5 Cows having Calves 1 s. 4 d. and for 6 Cows having Calves 2 s. 8 d. and for 10 Cows having Calves 2 s. 8 d. and for every Cow without a Calf 1 d. and for every Milch-Cow 1 d. in Satisfaction of all Tythes of Cows, Calves, and ~~Herbage~~ and ~~Pasture~~ of their Lands in that Parish, and this was held a void Prescription, because the Payment of this *Modus* for Cows and Calves could be no Satisfaction for the Tythes of Herbage and Pasture; besides, 'tis not alledged what should be paid when there are more than 6 Cows, and under the Number of 10, or when they exceed that Number.

Deer. See **Parth.**] Deer are not Tytheable *de jure*, because they are *feræ natura*, *Noy* 148. *Het.* 147. but they may pay Tythes by Custom.

Elm.] Elm above 20 Years growth pays no Tythes, for 'tis Timber.

Eggs.] Eggs are Tytheable in kind, and where such Tythes are paid, there is none due for the Chicken; so where Tythe is paid for Chicken, there is none due for Eggs.

It is a good *Modus* to pay 30 Eggs in *Lent*, for all Tythes of Eggs, 1 *Rol. Abr.* 648. *Plito.* 3.

Fallow-ground.] Fallow-Ground pays no Tythes for the Pasture in that Year in which it lies fallow, unless it remain beyond the Course of Husbandry, for it makes the Land more Fruitful the Third Year, 1 *Rol. Abr.* 642. *Plito.* 9. 649. *Plito.* 4.

Fera Natura.] Beasts and Birds which are *Fera Natura* are not Tytheable; but Rabbits in a Warren, and Pidgeons in a Dove-House are not properly *Fera Natura*, because they are kept under Custody, and by that Means are reduced to be the Property of particular Persons, and so are Bees under a Hive, and therefore all these pay *Tythes* by Custom, 2 *Inst.* 651.

Fenny-Grounds.] Fenny-Grounds drained from the Water and made arable, or converted into Pasture, must pay *Tythes*, notwithstanding the *Statute* 2 *Ed.* 6. 3 *Bulst.* 165. *Moor* 430.

Fish.] Fish taken in the Sea are not Tytheable *de jure*, because they are not only *Fera Natura*; but the Sea is not properly in any Parish, 1 *Rol. Abr.* 636. *Plito.* 6. *Cro. Car.* 264.

But if that is a good Reason, then they should pay *Tythes* when caught in a River, because most Rivers are in some Parish; and yet Fish caught in a Common River pay no *Tythes*, *Cro. Car.* 339. 1 *Rol. Abr.* 636. *Plito.* 6.

'Tis true, *Anno* 9 *Car.* the Court was divided upon this Point, but yet they granted a Prohibition to try the Right.

But *Tythes* may be paid by Custom for Fish caught in the Sea and in the Rivers; and in some Places in *Cornwall* they pay *Tythes* of Fish caught in the Sea to the Parson of that Parish wherein they are landed, and so at *Tarmouth* they pay *Tythes* for Herrings, but not the Tenth Fish, but so much Money, for this is a Personal Tythe, and therefore the Tenth shall not be paid, unless by Custom, 1 *Rol. Abr.* 656. *Plito.* 42.

If a Man suggests a Custom that all the Fish in a Ship should be divided into 10 Doles, after the Owner's Part is separated for the Use of his Ship, and that then the Tenth Dole is to be divided, one Moiety to the Parson, and the other to the Town of *Tarmouth*; this was held to be good, 1 *Rol. Rep.* 419.

Flax.] Flax pays a Prædial-Tythe like Hemp, and 'tis accounted *inter minutas decimas*, 1 *Rol. Abr.* 643. *Plito.* 3.

Tho' it grew in great Quantities in the open Fields; but by the Opinion of * *Chief Justice Holt* they are minute *Tythes* when they grow only in Gardens and other little enclosed Places, but when they grow in the Fields they are great *Tythes*.

Forest Lands.] Forest Lands, not in any Parish, do generally belong to the Queen by Virtue of Her Prerogative, and She being seised of such Lands shall pay no *Tythes*; but tho' this is a Privilege annexed to the Crown, it may be a Question whether the Grantee of such Lands can have that Privilege.

My Lord *Rolls* tells us he may; but 'tis certain, that if a Forest is disforested, the Grantee of the Queen shall pay *Tythes* for those Lands, which were formerly Parcel of the Forest, *Jones* 387. *Cro. Car.* 94. *Het.* 60. 1 *Rol. Abr.* 655, 657.

Fowl.] If Fowl are killed to make Profit of them, the Owner must pay a Personal *Tythe*.

Domestick Fowl pay Tythe-Eggs, or Chicken in their several Kinds; but where they pay Tythe-Eggs there shall be no Tythes paid of Chicken.

Fruit of Trees.] Apples, Pears, Plums, &c. pay a Prædial-Tythe as soon as gathered, and an Action will lie upon the Statute of 2 Ed. 6. for subtracting such Tythes, or for not setting them out.

Furzes.] Furze pay a Prædial-Tythe, unless the Owner of the Ground can be discharged by Custom, upon Payment of Tythe-Milk, or Calves of such Cows which are depastured on that Ground where the Furzes grows, *Litt. Rep.* 367.

Gardens.] Gardens pay Tithes for Herbs, Hemp, Plants, Seeds, Saffron, Wood; and this must be paid in kind, and therefore the Tenth Part ought to be set out for the Parson.

Grass. See Agistment.] Grass pays a Prædial-Tythe; but if 'tis cut and carried to feed the Owner's Plough-Cattle, before 'tis made into Hay, not having sufficient otherwise to keep them, no Tythe ought to be paid for it, 1 *Rol. Abr.* 645.

Where the Custom is not to the contrary, the Parishioner ought to make the Grass into Hay; but in many Places the Tenth Grass-Cock is set out, and in such Case the Parson may *de jure* make it into Hay upon the Land where it did grow, without alledging a Custom for it, 1 *Rol. Abr.* 643.

A Prescription to pay the Tenth Acre of Grass, standing in lieu of all Tythe-Hay, is good. 1 *Rol. Abr.* 648. *Plito.* 7.

Tythes shall not be paid for the After-moath of Clover-Grass, no more than for the second Crop of ordinary and common Grass, *Lutw.* 1704.

Gravel.] Gravel pays no Tythes.

Hay.] Hay pays a Prædial-Tythe, as well in Orchards as in Meadows; but no Tythes shall be paid for that which grows on Head-lands, where the Plow-Cattle can have only room to turn; but then there must be a Custom alledged to pay it, and the Party must aver that Head-land is only large enough to turn the Plough on it, 1 *Rol. Abr.* 646. *Lett. Rep.* 13.

And if once Tythes are paid for Hay, no Tythe shall be paid for the After-pasture of the same Land, in the same Year, 1 *Rol. Abr.* 640. *Telv.* 86. 2 *Cro.* 116.

As to the manner of Tything it, the Custom of the Place is to be observed, for in most Places the Tenth Cock is set out after 'tis made in Hay; but where there is no such Custom, the Tenth Grass Cock may be set out, 1 *Rol. Abr.* 644.

And therefore, tho' the Tythes of Grass ought of Right to be made into Hay, yet a whole Parish may prescribe to pay the Tythe in Grass Cocks before 'tis tedded, and this without any Consideration given to the Parson, 1 *Rol. Abr.* 647. *Plito.* 1.

But if 'tis suggested that the Owners of the Land have, time out of mind, found Straw to thatch the Body of the Church, and have therefore been discharged of all Tythes of Hay; this is

not

not good, for the Parson hath no Benefit by it, because the Parishioners are to repair the Church. *Cro. Eliz.* 276.

If there is a *Modus* for the *Tythe* of Hay, and the Meadow is converted into Tillage, the Parson shall have the *Tythe-Corn*; but when the Lands are again converted to Meadow, the *Modus* shall revive, *Godb.* 194.

So in Consideration that the Parson and his Predecessors, time out of mind, had been seised of a Meadow in the Parish, the People should be discharged of Tythe-Hay, this is good; for it shall be intended that the Meadow was originally given to the Church, in discharge of the Tythes of the Parish, *1 Rol. Abr.* 649. *Plito* 6. but 'tis not a good *Modus*, that, in Consideration he had spent all his Hay in feeding Plough-Cattle, he should be discharged of the *Tythe-Hay*, *1 Rol. Abr.* 650. *Plito* 13.

Heath.] *Heath.* See *Furze*.

Heath and wast Ground (other than such as are discharged from Tythes by Parliament) and which have heretofore paid no Tythes, by reason of Barreness, and which are afterwards improved and converted to arable and meadow, shall at the End of Seven Years next after such Improvement pay Tythes, by Virtue of the Statute 2 & 3 *Ed. 6. cap.* 13. or if they yeild some small Tythes before the Improvement, they shall pay the same, during the first Seven Years, but afterwards shall pay the full Tythes according to the Improvement.

Hemp.] Hemp pays a *Prædial-Tythe*; and because there were various Ways of tything it, therefore by a late * Act of Parliament a constant Annual Sum of 5 s. per Acre shall be paid for Hemp-land before 'tis carried off the Ground, and so in Proportion.

Herbage.] *Herbage.* See *Pasture*.

Honey.] Honey pays a *Prædial Tithe*, and the manner of Tything it is by the Tenth Quart, or Pint, *Cro. Car.* 559. *Jones* 447. *1 Roll. Abr.* 635. *Plito* 1.

Hops.] Hops likewise pay a *Prædial Tythe*, but the manner of Tything it is various, according to the custom of the Place; and of this Opinion was Justice *Twissden*, who lived in Kent, and affirmed they might be Tythed by the Hills, by the Pole, or by the Bushel, and if so, then the Tenth Part may be set out before they are Dried, and this agrees with the Case Reported by Justice *Hutton*, *Sid.* 283. *Hut.* 77.

But my Lord *Rolls* tells us, they ought not to be Tythed before they are dried, *1 Roll. Arb.* 644. *Plito* 3.

A *Modus* cannot be pleaded in discharge of Tythe Hops, because they were brought into England in Queen Elizabeth's Reign; but a Suggestion to pay so much in lieu of all small Tythes will comprehend Hops, and in such Case a Prohibition hath been granted, *Sid.* 443. *1 Vent.* 61.

But Hop-poles are not tytheable, when the Hops pay Tythes.

Horses. See **Cattel.**] If a Man keeps a Horse for the Saddle, no Tythes shall be paid for his Pasture; but if the Owner should be sued, he must aver that he kept the Horse for his Work and Labour, 1 *Roll. Abr.* 641. 2 *Crr.* 430.

The Case of *Pothil* and *May* is very imperfectly reported by Mr. *Bulstrode*, in his first Part, fol. 171. viz. that no Tythes ought to be paid for the Herbage of Saddle Horses kept for Pleasure; but for Cart-Horses to till the Ground, the Owner ought to be answerable to the Parson for their *Herbage*, which is contrary to several Resolutions in the like Cases.

'Tis true, if an Inn-keeper Depastures Travellers Horses, he must pay Tythes for the *Herbage*, unless he paid Tythes for the Hay of the same Ground, *Hardres* 35. 1 *Roll. Abr.* 641, 650.

But if Horses are kept to sell, and afterwards are sold, Tythes shall be paid for their Pasture, 1 *Roll. Abr.* 647. *Plito* 14.

Houses.] Dwelling-Houses are not properly Tytheable, because they do not Annually Encrease; but by a Decree made by the *Privy Council*, Anno 1535. it was Ordered, that 2 s. 8 d. should be paid for every House in *London*, which Decree was confirmed by Act of Parliament, Anno 37 *Hen.* 8. cap. 12.

Now, this Statute relating only to *London*, and the Liberties thereof, the Question was solemnly debated in Dr. *Gram's* Case, 11 *Rep.* 16. whether the Parishioners of *St. Martins le Grand* should pay 2 s. in the Pound Rate for their Houses there, because it was a Liberty exempted from *London*, and for that no Tythes ought to be paid for Houses, without a special Custom, but it was adjudged that such Tythes should be paid because it may be reasonably supposed that it was usual to pay so much for the Land before the Houses were Built on it.

In Dr. *Layfield's* Case, *Hob.* 11. A *Modus* was denied to pay for Tythes of Houses in the Parish of *St. Clements Danes*, without *Temple-bar*; because where no Tythes are due *de jure*, as they are not for Houses, there can be no *Modus* for it, that being only an Abatement of the full Tenth Part, but it was agreed that such a way of Tything had been long used about *London*, and when the Statute took care of that City, the Places adjoining gained the same manner of Tything by Colour thereof.

And tho' a Man should suggest that the House was held of a Priory, which was discharged of Tythes for all their Possessions, that will not prevail; because there is a subsequent Statute which charges all Houses in *London*, except those of Noblemen, *Moor* 912. 37 *Hen.* 8. cap. 12.

Lambs. See **Catbs.**] Lambs pay a mixt Tythe; but the Payment is usually guided by Custom.

If the Parishioner hath Six Lambs or under, he shall pay a Half-penny for every Lamb, and if he hath above that Number, then to pay one Lamb, this is a good Custom.

The Tythe is to be apportioned with respect to the Places where the are engendred, brought forth and nourished, and 'tis to be paid when they are weaned.

A Prescription to pay an Half-penny for every Lamb which he shall sell before *May-day*, without any other Tythe for them, and he sells them all before *May-day*, this is not good, for 'tis a meer Fraud. 1 *Roll. Abr.* 652. *Plito* 1.

Lead.] Lead is not Tytheable *de jure* ; but it Pays Tythes in *Derbyshire* by Custom.

Limekiln.] So by Custom Tythe may be paid of a *Limekiln*, tho' there is nothing due *de jure*, 1 *Roll. Abr.* 642. *Plito* 7. but not of *Lime*, for 'tis Parcel of the Freehold, 2 *Inst.* 651.

Lops of Trees.] Lops above 20 Years Growth pay no Tythes, for the Branch is privileged as well as the Body of the Tree. *Moor* 762, 908. 11 *Rep.* 48.

And so 'tis if the Tree was not privileged at the first Lopping, yet if afterwards 'tis lopped, no Tythes shall be paid. 1 *Brownl.* 33.

But this is contrary to the Opinion of the Chief-Justice * *Richardson*, which was, that, if the Oaks or Ashes under 20 Years Growth are lopped, the Branches are for ever afterwards Tytheable.

If the Tree become Rotten and fit only for Fuel, 'tis not Tytheable, because it was once privileged, *Moor* 908. but Justice *Croke*, who Reports the same Case informs us, that the Court was divided, *Cro. Eliz.* 100.

Marble and Marle Pits.] Marble and Marle Pits pay no Tythes, 2 *Inst.* 651.

Mast.] Mast of Oak or Beech, if eaten by Hogs, then the Tenth of the Value of such Mast ought to be paid, but if sold, then the Tenth Penny is due for Tythe.

Monks.] Are freed from paying Tythes of the Herbage, by the Custom of the Realm, 2 *Inst.* 652.

Mills.] As there are several sorts of Mills, so the Tythes of them are different, as for Instance, the Tythes of Corn-Mills are Prædial; the Tythes of Fulling, or Paper-Mills are Personal. 1 *Roll. Abr.* 656. *Plite* 3, 4.

Copper, Corn, Fulling, Iron, Lead, Paper, Plate, Powder, Rape, Saw, Stamping and Tin Mills; Of these Corn-Mills only pay Tythes in kind as Mills, and that is the Tenth Toll-Dish; and Corn-Mills built before the Statute 9 *Edw.* 2. are Tythe-free, therefore where a *Suit* is brought for Tythes of an ancient Mill, the Defendant must suggest that the Mill is very ancient, and hath never paid Tythes, and he must make Oath of the Truth of this *Suggestion*, for all new Mills pays Tythes. 2 *Cro.* 429. If a Corn-Mill should be built upon any Land discharged of Tythes, by any *Modus*, the Mill shall be likewise discharged. 1 *Roll. Abr.* 652. *Plito* 4.

But this Case seems to be unreasonable, and therefore 'tis not Law; for the Profits of Lands, and of some Mills are of different Natures; the one Pays a Prædial, and the other a Personal Tythe, and so are charged, not in respect to their real Value as Lands are, but in respect to the Labour of Men, 1 *Roll. Rep.* 405. and therefore all Mills, except Corn-Mills, pay Tythes not as Mills, for they are only Engines of several Occupations, and the Persons using them pay Personal Tythes if they have been paid for 40 Years next before the Act 2 E. 6. 2 *Cro.* 523. 2 *Roll. Rep.* 34. 1 *Roll. Abr.* 641, 19.

If a *Modus* of 6 s. 8 d. is paid for the Tythes of an ancient Corn-Mill, and the Mill-Stream should change its course by accident, and not by the Act of the Party, and the Owner pulls down his Mill, and rebuilds it to the Stream, the *Modus* shall still continue, but if he had diverted the Stream himself, and then rebuilt the Mill to it, he ought to pay Tythes as for a new Mill. 1 *Roll. Rep.* 641, 652. *Plito* 1.

If there is a *Modus* for a Corn-mill, and the Party adds Two new Mill-Stones, there being anciently but One Pair, the *Modus* shall not extend to the new, but the Parson shall have the Tenth Toll-Dish.

Milk.] Milk Pays a mixt Tythe. 2 *Brownl.* 30.

Sometimes 'tis *Tythed* by the Tenth Quart, at the Parsonage-House, or any other Place. *Cro. Eliz.* 609. *Moor* 909.

But this being very troublesome, it hath been adjudged to pay the Tenth Meal, and not the Tenth Quart at every Meal; and some have been of Opinion that this Tenth Meal ought to be carried by the Owner to the Parsonage-House, or to the Church-Porch; but this must be the Custom, for in all Cases the *Tythes* are to be set out, and paid where they arise. *Raym* 277.

In some Places they pay Cheese, and in other Places neither Cheese nor Milk, but some small Rate, so that the Custom of the Place is to be observed.

A *Modus* to pay the Tenth Cheese made from *May-day* till *August*, in full Satisfaction of all *Tythe-Milk* of that Year is good. *Cro. Eliz.* 609. 1 *Roll. Abr.* 651. *Plito* 19.

Mines.] Mines of Brass, Copper, Coals, Iron, Lead, Tin, pay no *Tythes* but by Custom.

Modus.] As to a *Modus* I shall mention it under the respective Titles to which it properly belongs, but this I shall observe in general, viz. that where-ever a *Modus* is alledged, there must be some Benefit left for the Parson, though not the whole which is due, and therefore to prescribe to be discharged of Tythes in Consideration that he had employ'd all the Profits of such Land to repair the Body of the Church, or to find other Necessaries for the same is not good, because there is no Recompence for the Parson; but if it had been to repair the Chancel, 'tis otherwise. 1 *Roll. Abr.* 640. *Plito* 8.

Monasteries. See *Abby Lands*.

Nurseries.] Nurseries of young Trees *pay* Tythes, for tho' these Trees are Parcel of the Freehold, yet when they are sold and severed in order to be transplanted into another Place or Parish, or in the same Parish, they *pay Tythes*, otherwise all, or the greatest Part of the Parish, might be converted into Nurseries, and so the Parson would have no Tythes, *Cro. Car. 526. Jones 416. 1 Roll. Abr. 637. Hardres 380.*

If the Owner pull them up, he shall *pay Tythes*, but if he sells them to another before they are transplanted, the *Buyer* shall *pay* it. *Hardres 380.*

Oaks.] Oaks above 20 Years Growth, tho' not Timber, and only fit for Fuel, *pay* no Tythes. *Moor 541.*

Nor small Oaks under 20 years Growth, which are apt for Timber. *Moor 908.*

Orchard.] If the Soil of an Orchard is sowed or planted, the Parson shall have Tythes thereof, as well as of the Fruit of the Trees, because they are of distinct Natures. *2 Inst. 652. 1 Roll. Abr. 642, 5.*

Park.] If a Park is disparked, and converted into Tillage, it shall *pay Tythes* in kind; but if there was a *Modus* before, it shall continue still. *1 Roll. Rep. 176. per Coke.*

But this must be understood where the *Modus* was to *pay* so much Money for all Tythes of the Park, for if 'tis for all Tythes of the Deer in the Park, then 'tis otherwise; as for Instance, if a Man prescribes to *pay* a Shoulder of every Deer killed in the Park, or one Deer out of the Park, in such Case, if 'tis disparked, the Custom is gone, and Tythe shall be paid in kind; but if the Custom was to *pay* a Shoulder of Venison generally, or to *pay* so much Venison in lieu of all Tythes, and 'tis not said out of the Park there, though 'tis disparked, the *Modus* shall continue.

In *Comper* and *Andrew's* Case, the Court was divided: It was a Prohibition suggesting a *Modus* to *pay* 2 s. *Tearly*, and a Shoulder of every Deer killed in the Park; *Hobart* and *Nichols* held, that the *Modus* of 2 s. continued, notwithstanding the Park was disparked; because it was a Sum certain, the other was but Casual; but the other Two Judges held that it was an entire *Modus*, tho' it consisted in Distinct Matters, and therefore if part was gone (as they all agreed it was) the whole must likewise be determined, and the Parson ought to have the Tythes in kind, and so it was afterwards adjudg'd in *Moor 909*. The principal Case is reported in *Moor 863. Hob. 39. 1 Rol. Rep. 120. 1 Rol. Abr. 651.* in which Case they agreed that had only 2 s. been paid, then it should continue so still.

Pheasants and Partridges] Partridges and Pheasants, if made Tame, *pay* a Personal Tythe, but if kept in a Wood enclosed, and their Wings are cut so as they cannot fly out, and there they lay Eggs, and hatch Young ones, no Tythes shall be paid for them, because, tho' under a Restraint, they are *fera natura*, and are not reclaimed; for if their Wings were not clipt they would fly out of the Enclosure. *1 Rol. Abr. 636. Plito 5.*

Pasture] See Agistment: See Grass.

Pease] If Pease are gather'd Green, to spend in the Owner's Family, they *pay* no Tythes. *1 Rol. Abr. 647. Plito 11.*

Personal Tythes] By the Canon Law, every Person ought to pay a Tenth Part of his clear Gains, either by Trade or Merchandize his Charges being deducted; but the Statute of 2 Ed. 6. restrains the Canon to such Persons who had constantly paid the same within 40 Years before the making that Act.

Pigeons] Pigeons ought to pay Tythes *de jure* if they are sold, but not if spent in the Owner's House; *Het.* 147. 1 *Rol. Abr.* 644. and the Reason is, because 'tis a Provision to support him in his Labour about other Affairs, for which the Parson may have Tythes. 1 *Rol. Abr.* 635. *Plito* 2. 2 *Rol. Rep.* 2. *Lit. Rep.* 40. 311.

'Tis true, the Books which are cited tell us so, but to me this seems to be a very indifferent Reason, because in Tything the Nature of the Thing is to be considered, and not where it is spent.

Now, if the Place where Pigeons are spent would make them not Tytheable, when in their own Nature they ought to pay Tythes, then Corn, Piggs and Calves spent in the Owner's House stand upon the same Reason, and no Tythes would be paid for them, which would be of mischievous consequence to the Clergy, if it should be allowed to be Law.

If a Man hath Pigeon-holes about his House, and Pigeons encrease there, which are spent in his Family, he shall pay no Tythes for them. 1 *Rol. Abr.* 644. *Plito* 6.

Piggs] Piggs pay a mixt Tythe, in the same Nature with Calves, *quod vide.*

Hollards] Above 50 Years growth shall pay Tythes where felled, *per* Opinion of Justice Windham.

Quarries] Quarries of Coals, Slat, Stone, Gravel, Sand or Clay pay no Tythes, for they are Parcel of the Inheritance. 1 *Rol. Abr.* 637. *E. Plito* 1.

They are of the Substance of the Earth, and do not *Annually* encrease. 2 *Inst.* 651.

Rakings] The Tenth Cock being set out, the Rakings of Corn are not tytheable, unless by Custom, for they are left for the Poor. *Moor* 278. 1 *And.* 199.

These Rakings are properly the scattering of the Corn whereof Tythes have been paid, but it must be understood of such Rakings which are not voluntarily and fraudently left behind. *Cro. Eliz.* 660. *Moor* 910. *Lit. Rep.* 31.

Therefore the Suggestion in such Case must be, that they are *minus voluntarie sparsæ*, and 'tis not sufficient to alledge that they were *lapsæ in collectione*. 1 *Rol. Abr.* 645. *Plito* 12. *Cro. El.* 702. 2 *Cro.* 575.

Roots] Roots of Coppice Grounds grubbed up, pay no Tythes, for they are Parcel of the Freehold; they are neither *Crescentes* or *Renovantes*. *March* 58. 1 *Rol. Abr.* 637. *Plito* 7.

Saffron] Saffron Pays a predial Tythe, and 'tis accounted *inter minutas decimas*, therefore, tho' 'tis enacted *per Statute* of 2 & 3 Ed. 6. cap 13. that Tythes shall be paid as usual for 40 Years last past, before the making that Act, yet, if Corn hath been sowed in a Field for 40 Years, and the Parson had the Tythes, and the Field should be sowed with Saffron, the Vicar shall have the Tythes. 1 *Rol. Abr.* 643. *V. Plito* 1. *Cro. Eliz.* 476. *Idem, Owen* 74. *Idem, Goulds.* 149. *Idem, Moor* 909.

Dalt.

Salt.] Tythes must be paid of Salt, but this is by Custom only.

Sheaf.] See Corn.

Sheep See Wool.] If Sheep continue in the Parish all the Year, they are to pay Tythe-Wool in kind, but if removed from one Parish to another, the Parson of each Parish must have Tythes *pro rata*; but then by the Canon Law they must continue 30 Days in a Parish, otherwise a ratable Tythe is due.

If they are fed in one Parish, and brought into another to be Shorn, they must likewise pay *Tythes pro rata*.

If they die of the Rot, the Wool is not tytheable unless by Custom. If Sheerd about the Neck to preserve them from Vermin, the Wool is not tytheable. 1 *Roll. Abr.* 645. *Plito* 41.

So likewise if kill'd and spent in the *House* of the *Owner*, the Skins are not tytheable but the Wool is. 1 *Roll. Abr.* 647. *Plito* 10.

Slate.] Is not tytheable, *Cro. Eliz.* 277.

Silva Cædua.] *Silva Cædua*, this is Underwood under 20 Years growth, which being cut renews again from the same Stock or Root, and it pays a Predial Tythe.

But Wood usually cut for Firewood, altho' 'tis of 25 Years growth or more, shall pay Tythes.

Tares.] Tares cut Green and given to Plough Cattle pay no Tythes; but it may be a Question whether a Prohibition will be allowed upon a general Suggestion of this Matter; without alledging a Custom in the Parish that no Tythes shall be paid for such Tares: *Lane* 16. *Cro. Car.* 393. *Jones* 357. 1 *Roll. Abr.* 650. *Plito* 12.

Tiles.] Tiles are not tytheable. 2 *Inst.* 651.

Timber and Trees.] Timber-Trees, and particularly Oak, Ash and Elm, above the Age of 20 Years were discharged of Tythes by the Common Law long before the Statute 45 *Ed.* 3. for that Act was in Affirmance of the Common Law; and the Reason of this Privilege is, because such Trees are employ'd for Timber to build Houses. *Cro. Eliz.* 1. 1 *Brownl.* 94.

And if they grow so long till they become rotten and fit only for Fuel, yet they pay no Tythes, because being once privileged, it shall not be lost by their decrease. *Cro. Eliz.* 477. *Goldf.* 145. *Moor* 551. 2 *Cro.* 100. 1 *Roll. Abr.* 640.

So Trees cut for Plough-boot, Cart-boot, Fencing, &c. pay no Tythes, though they are not Timber.

But all Trees not fit for Timber, and not put to the Uses aforesaid, though above 20 Years growth pay Tythes.

Turkeys.] There is a Case in *Moor* 599. where 'tis held that Tythes ought not to be paid for *Turkeys*, or their Eggs, but this must be a Mistake, and of that Opinion was Sir *Simon Degg.* *Fo.* 179.

Turfes.] Turfes used for Fuel pay a predial Tythe, and yet they are Parcel of the Soil. 2 *Keb.* 596.

Underwood. See Wood.] Underwood pays Tythes, but if us'd for fencing Corn or Pasture-Ground it pays none. *Cro. Eliz.* 499. *Moor* 683.

But then it must be for fencing his own Corn, and the Reason is, because the *Owner* may give away all his Underwood to Fence the Corn of other Men; and if so the Parson can have no Tythes of it:

But 'tis unreasonable to suppose any such thing, and if it was probable to be done, yet the Person can have no Prejudice by it, if that Corn was enclosed, of which he had the Tythes. 1 Sand. 141.

If the Owner will not cut his Coppice-Wood till above 20 Years growth, yet he shall pay Tythes for it, especially if 'tis cut for Fuel. Sid. 300.

Wast.] If there are large Wast-Grounds, and 'tis not certainly known in what Parish they are, the Cattle feeding there shall pay Tythes to that Parson where the Owner Dwells, per Stat. 2 Ed. 6 ca. 16.

Wax.] Bees-Wax is *tytheable de jure* by the Tenth Pound. 1 Rol. Abr. 935. Plito 1.

Willows.] Tho' it may be Wast to fell Willows, because in some Places they are used for Timber, but especially if they grow so as to shelter the House from Storms, yet if they are fell'd, tho' above 20 Years growth, they shall pay Tythes. Hob. 219. 1 Rol. Abr. 840. Q. 8.

Woad.] Woad pays a predial Tythe, and it growing in the Nature of an Herb, 'tis accounted *inter minores decimas*. Har. 77. Item Cro. Car. 28.

Wood.] Wood likewise pays a predial Tythe, and sometimes 'tis accounted also *inter minores decimas*; as for Instance, if a Vicaridge is endowed with small Tythes, and the Vicar always had the Tythe of Wood, in such Case it shall be accounted a small Tythe; but 'tis generally esteemed to be great Tythes.

But 'tis not *tytheable* if spent in the Owner's House, though it may be so by Custom, for 'tis not discharged by the Law. 1 Rol. Abr. 644. Plito 1. Cro. Car. 113. Her. 110.

Yet if the Defendant suggests that it was burnt in his Dwelling-House, by reason whereof the Parson had *uberiores decimas*, this is good. 1 Vent. 75. 1 Rol. Abr. 656. Sid. 447.

Tythes ought not to be paid for it, where 'tis used for fencing Corn. 1 Rol. Abr. 944. Plito 2.

So if 'tis cut and burnt to make Bricks to repair or enlarge the Owner's House 'tis not *tytheable*. 1 Rol. Abr. 845. Plito 8.

But then such Enlargement must not be only for his Pleasure, nor more than is necessary for the Habitation of his Family, for, if 'tis not so alledged in the Suggestion it will be difficult to get a Prohibition because a general Suggestion that the Wood was burnt to make Bricks for the Enlargement of his House would be so inconvenient that it might deprive the Parson of his Tythes, for he might build a Palace. 1 Rol. Abr. 845. Plito 10.

If Wood Grounds have likewise Timber-trees growing on them and consists for the most Part of such Trees, only some small Bushes and Underwoods intermixt, the Trees shall Privilege the Whole but if such Trees grow *Sparsum*, and the Underwood is the greater Part, then it must pay Tythes for the Whole.

'Tis to be observed that Wood is *tytheable* only by Custom, for before Archbishop Strausford made a Canon that it should pay Tythes, paid none; and as it is *tytheable* by Custom, so it may be exempted from Payment of Tythes; for Prescriptions are allowed in non decimando for Wood in the *Weld of Kent and Sussex*, but such a Prescription was never allowed for Corn, because that Pays Tythes *de jure*.

A Custom that the Parson hath enjoy'd such a Wood Parcel of the Manner &c. in Satisfaction of all Tythe-Wood within that Parish is good. 1 Rol. Rep. 355.

So a Prescription to pay the Tenth Acre standing is good. 1 Rol. Abr. 645. Plito 8.

Lastly, the manner of *Tything* it is by the Pole or Pearch, or by the Tenth Faggot or Billet according to the Custom of the Place.

[Scol] This *Pays* a mixt Tythe, and proportionable to the Time the Sheep are in the Parish; as for Instance, if 40 Sheep yield 80 lb of Wool, and are depastured in One Parish for a whole Year, the Parson shall have 8 lb of Wool, and by consequence but 4 lb if fed there only for Half a Year, and so 2 lb for 3 Months, and but the Tenth of the Twelfth Part of the Wool, if they are fed there for One Month, and no longer.

If Sheep are killed and spent in the Owner's House no Tythes are to be paid for their Skins, but their Wool is Tytheable. 1 Rol. Abr. 646. Plito 18.

And 'tis to be observed, that the *Tythe-Wool* ought to be paid on the Day of shearing the Sheep.

There are several Prescriptions relating to *Tythe-Wool*; as if a Man hath under 10 Fleeces, then to pay a Penny for each Fleece, and if more, then to pay the Tenth Part *sine visu & tactu* of the Parson, but this is an unreasonable Prescription.

Neither is it a good *Modus* to pay the 10th lb for *Tythes* of Wool, if he doth not shew that he is to pay something for *Tythe* under 10 l. because otherwise as to what is under 10 l. 'tis a *Modus in non decimando*. 1 Rol. Abr. 648 Plito 4.

But 'tis a good *Modus*, that in Consideration he did wind the Wool into a Fleece, to be discharged of the *Tythes* of that Wool which he sheered from the Necks of the Sheep a Fortnight before and after *Michaelmas*; because it appears such sheering could not be for the Gain of the Wool alone, but to preserve the Sheep from Vermin. 1 Rol. Abr. 649. Plito 5.

So a Suggestion to pay the Tenth Part of Wool of all the Sheep he had before *Lady-Day*, and which he sheared or sold, and that it was to be in Satisfaction of all the Wool of such Sheep which should be brought into the Parish after *Lady-Day*, is good. 1 Rol. Abr. 649.

So 'tis a good *Modus*, that, in Consideration a Parishioner hath Time out of Mind paid *Tythe-Wool* of all Sheep at the Shearing, as well of those which he bought but Two Days before the Shearing, as of those which were kept all the Year in the Parish, he should be discharged of the Tythes of those he should sell but Two Days before the Shearing. 1 Rol. Abr. 648. Plito 1.

Titte.

THIS word, as it relates to Ecclesiastical Persons, was at first only the entring a Priest's Name in the Bishop's Registry, by which he was made one of his Clergy, and from which he could never be discharged without the Bishop's Consent; and in those Days if a Man was not owned by some Bishop, it was usual to say that he was *sine Titulo*,

But this was before there was any Parochial Division, for afterwards the word Title came to be applied to Parish-Churches, for *Parochia* is *accolens ad sacram adem, titulus autem ades ipsa*, and sometimes these words were promiscuously used to signify each other.

But when the Boundaries of Parishes were fixed, then the Parochial Clergy, who had the greatest Maintenance by the Extent and Largeness of their Endowments, were allowed by the Canon Law to have Curates, which were called *Capellani Parochiales* or *Stipendiarii*, and the Rectors of those Parishes might give such Persons a Title to receive Orders as Assistants to them, tho' they had no legal Title to the Cure it self; but then to make them more cautious in giving these Titles they were bound to maintain those Curates if they should happen to stand in need of it, or rather the Bishop was to do it, if he ordained a Man without a Title, that is, without any Assurance of being employed as an officiating Clergyman in some Church or Place of Divine Service.

This appears by the Thirty Third Canon, which provides that no Person shall be admitted into Orders, except he bringeth a Presentation to the Bishop; by which he is presented to some void Church, or unless he bring a Certificate, that he is provided of some Church within his Diocese, or of some Minister's Place vacant in a Cathedral or Collegiate Church, or that he is a Fellow of a College in one of our Universities, or except he is Master of Arts of Five Years standing, or is to be admitted by the Bishop himself in a short Time to some Benefice.

If the Bishop should admit him to Orders without any of these Titles, then he is to keep him till he is preferred, and if he refuse he shall be suspended by the Archbishop, and one Bishop more, from giving Orders for one whole Year. And here I cannot but take Notice, that this Discipline of the Reform'd Churches is an effectual Remedy to prevent those Evils, which are so frequent among the Catholics, for 'tis a common thing in Italy to see 10 or 12 Priests in a Vestry waiting for some Person to give a *Julia* among them to say Mass, and sometimes to see them turned out of the Vestry before they have got a Penny to buy Bread: This is not so common in France; but yet there are many such Adventurers in that Country who have no fixed Parishes, and can scarce subsist by that little Money which is given them for this Work. A late * Traveller has told us, that he always shunned those Priests as he would *Pick-Pockets*, and that it was a kind of *Sacrilege* for them to take Money on this occasion; so that if it was in those Places as it is with us, that no Man should be ordained but some Benefice, they might be freed from such Wanderers.

Vestry.

THIS word *Ex vi Termini* signifies the Place where the *Vestments* of the Priests are kept. The first and the greatest Authority we have for it is from the Holy Scripture, for when *Jehu* intended to

* In a Book entituled, *Sure and Honest Means to Convert Hereticks*, Part II. pag. 26.

destroy the Worshippers of *Baal*, he ordered those who were over the Vestry to bring out Vestments for them. 2 Kings 10. 12.

It hath been the Custom of all Nations to appropriate peculiar Vestments to their Priests, not only when they are in the actual Performance of Divine Offices, but when they are about other ordinary Occasions.

Our Church hath appointed such distinguishing Vestments for the Priests, not out of any *Pharisaical* Pretence of Purity in those who wear them, but to distinguish from the Laity those who are set apart to Administer about Holy Things.

And not only those who are of the Inferior Order of Priesthood are thus distinguished, but even the Prelates of our Church have peculiar Vestments to distinguish them from other Ranks and Degrees of Men.

Those of the *Roman* Bishops are *Copes, Palls, Surplices, Hoods*, which are very rich and magnificent, but ours are Neat and Ornamental.

'Tis true, about the beginning of the Reformation there was a very great Contest about these Vestments; for *Hooper*, who was Bishop of *Gloucester*, refused to be consecrated in them, because they were not (as he imagined) agreeable to the Simplicity of the reformed Religion, but only invented for a pompous Celebration of the Mass, and were consecrated for that purpose.

But it is certain that these *Vestments* were used by the ancient *Fathers* before there was any such Thing as Popery; and tho' they were afterwards abused, even to Superstition, yet that could not be a tolerable Reason for taking them away; for if so, then the Churches themselves might, with the same reason, be pulled down, because they had also been consecrated with so many superstitious Ceremonies.

Vicar.

AFTER Diocesses were divided into Parishes, the Secular Clergy, who had the Charge in those Places, were called *Rectors*; and afterwards when their Rectories were appropriated to Monasteries, the Monks kept the great Tythes; but the Bishops were to take care that the Rector's Place should be supplied by another, to whom he was to allow some Portion of the small Tythe for his Maintenance; and this was called a *Vicar, quasi vicem Rectoris fungens*.

This Vicar was at first removeable, *ad nutum Prioris*, but by degrees he got a settled Maintenance, which consisted in the Glebe, and some small Tythes.

He is instituted and inducted in the same manner as a Rector, only with this difference, that, over and above what is required on a Rector, he is to take an Oath of perpetual Residence of his Vicaridge, *nisi aliter dispensatum foret ab Episcopo*; and without taking such an Oath, his Institution is void.

These Vicaridges were created when the King gave License to appropriate Benefices to Monasteries, and that was about the beginning of the Reign of *H. 3.* but because great Complaints might be made of such Appropriations, the Pope decreed that where a Benefice was appropriated, there should be a Vicaridge endowed, under a Penalty if it was not.

But this Penalty was easily remitted at *Rome*, insomuch that *Anno* 15 R. 2. *cap.* 6. the Parliament took it into Consideration, and made a Law, that upon every Appropriation the Bishop of the Diocese should see that the Vicar was competently endowed; which Law was of very little effect, because the Bishops in those Days favoured the Monks too much, and permitted them to send one of their own Number to officiate in the Parish-Church, and so kept both the great and small Tythes themselves.

Therefore, *Anno* 4 H. 4. *cap.* 12. another Law was made, that, in every Church appropriated, one should be ordained *Vicar Perpetual*, and be canonically Instituted and Inducted (which the Monks were not) and also competently endowed at the Discretion of the Ordinary; so that what the Vicar now Claims, is either by Endowment or Prescription.

The Endowment is the Original Grant or Agreement made by the Abbot and Convent, or other Religious Body, to or with the Vicar, they having the whole Benefice appropriated to them; and the *Quantum* was settled by the Bishop, who was to be the Moderator between them and the Vicar.

These Grants were registred in the Archives of the Bishop, or in the Augmentation Office, but most of them are now lost, and therefore if the Endowment it self doth not appear; and if no particular Proof can be made of it, yet the Appropriation is not void, especially if a *Vicar* hath ever since that Statute been Instituted and Inducted into the Vicaridge, for in such case it shall be presumed that the Vicaridge was lawfully endowed. 2 *Cro.* 252. And tho' it may be re-united to the Rectory, out of which it was originally taken, yet if no Vicar hath been presented for many Years, that shall be no discontinuance of the Vicaridge, for 'tis the Fault of the Parson himself in not Presenting; and therefore if a *Vicar* should get the Queen's Title by Lapse, he shall be entituled to the Endowment, tho' there had not been a Vicar presented before him for above 100 Years; for a re-union to the Rectory shall not be presumed by such discontinuance to Present, unless something be shewn to reunite the Vicaridge to it *Cro. Eliz.* 873.

And where the Vicar cannot produce the Endowment, there Prescription usually takes place; for if by constant Usage he hath enjoined such a particular Estate, that shall be a sufficient Evidence of the Endowment; and if he could produce the Original it self, and should claim something which is not mentioned in it, yet if he can prove that he and his Predecessors enjoyed it Time out of Mind, that will be a sufficient Proof to support his Right to it, because where there hath been a long and constant Possession, it may be reasonably presumed that the Vicaridge hath been augmented with what the Vicar claims by the Direction of the Bishop himself upon citing all Persons concerned.

The Endowment hath no relation to the Lands, but to the Tythes; for if the Vicar prescribes to have the small Tythes, and if the Land had been plowed Time out of Mind, so that the Parson had the Tythe of the Corn, yet if 'tis converted to any other use, and small Tythes grow on that very Land, the Vicar shall have them. 2 *Roll.*

Some Questions have been made concerning the meaning of words in ancient Endowments; as for instance, where it appeared to be *de decimis garbarum*; the Question was, who shall have the Tythe-Hay? and it was adjudged the Vicar should have it; for though *Garba* doth now signify a Sheaf of Corn, yet ancient Grants shall not be expounded by the modern Acceptation of words; for 'tis probable that in former Days *Garba* might be used to signify Hay, or at least that anciently Hay was bound in Bundles. 2 *Rol. Abr.* 335. *Plito* 7.

So by the word *Altarage*, the Tythes of Wool and Lamb, and of many other Things, are comprehended; but this must rather be by the force and power of Custom than of the word it self; that is, if the Vicar hath for a long Time enjoyed such Tythes, he shall have them still as comprehended by that word.

But there are several Churches in this Nation where the Tythes are wholly impropriated, and no Vicaridge endowed, and there the Impropiators are bound to maintain Curates to perform Divine Service; but as for Appropriations, whilst they were in the Hands of the Monks, the Bishop had Power to encrease the Salary of the Vicar; and if he could do so where the Vicaridge was endowed, I can see no reason but that he may do it where all the Tythes are impropriated.

Upon these Endowments the Vicar hath an equal, tho' not so great an Interest in the Church as a Rector, for he is *Perpetuus Vicarius*, the Soil in the Body of the Church is his Freehold, for 'tis part of his Glebe; he must repair the Church, and for that purpose the Trees in the Church-yard belong to him, 2 *Rol. Abr.* 337. *Plito* 3.

But this was by Virtue of the Statute 14 *Ed.* 3. *cap.* 17. for before that Act the Parson and not the Vicar had the Freehold of the Glebe, he was subject to every Charge of the Vicaridge, and if the Vicar himself was impleaded for any thing concerning it, he was to have Aid of the Rector; he could not maintain a *juris utrum*, which he may do now by Virtue of that Statute, and both the Parson and Vicar have distinct and separate Rights, and may maintain distinct Actions to recover such Rights.

'Tis true, the Vicaridge did originally belong to the Parsonage, for it was derived out of it; but now by Prescription it may be appendant to a Mannor, because 'tis possible the Rector might have granted it so Time out of Mind.

But if there is no such Grant, the Rector is still of common Right Patron of the Vicaridge, tho' by Composition it may be settled otherwise; and therefore if he makes a Lease of his Parsonage, the Patronage of the Vicaridge passes as incident to it. 2 *Rol. Abr.* 59. *Plito* 4.

But as it was taken out of the Rectory, so it may be united to it again; and this may be done by the Ordinary and Patron, as well when the Vicaridge is full, as when 'tis vacant; and tho' such Restitution should be defective when 'tis first made, yet being reputed to be good, the Statute of Dissolution hath fully vested it in the Crown. 2 *Rol. Abr.* 337. *Plito* 1. 2 *Cro.* 517. *Palmer* 113. *Eliz.* 843.

And as a Vicar hath the Freehold of the Glebe, so he may prescribe to have all the Tythes in the Parish, except those of Corn; and by Virtue of such Prescription he shall have the Tythes of those new Seeds,

Seeds, as Clover-Grass, Hops, &c. for tho' he cannot particularly prescribe in such Cases, because they are new Things, yet they are within such a general Prescription, because all small Tythes are thereby comprehended, and the great Tythes excluded. 2 *Rol. Abr.* 333. *Plito* 7.

But because Vicaridges are commonly endowed with small Tythes only, I shall give an Account what those are.

Wood in its Nature is great Tythe; but yet if a Vicaridge is endowed *de minutis decimis*, and by Virtue of that Endowment the Vicar had usually the Tythe of Wood, it shall pass by these words. 2 *Rol. Abr.* 335. *Plito* 8. *Het.* 135. 2 *Bulst.* 27. *Winch.* 70.

It hath been a Question, whether Saffron, Woad, Hemp, Hops, &c. should pay small Tythes or not; 'tis true, these Things grow in Nature of Herbs, and so may be accounted among small Tythes; but if they grow in great Quantities of Land, this changes them into great Tythes, that is, if whole Fields are planted with them; and this was the Opinion of the Chief Justice in *B.R.* in a late Case between *Wharton* and *Lisle*, 3 *Lev.* 365. 4 *Mod.* 183 and 'tis probable it was grounded upon the Judgment in *Udal* and *Tindal's* Case. *Hut.* 78.

But the Quantity of Land sowed with such Seeds cannot alter their Nature, nor can it make a Rule to determine what shall be small Tythes, and what great; for then, if a small Quantity of Land should be sowed with Corn, that would make it small Tythes, which no Body will affirm, so that the Nature of the Thing planted or sowed is chiefly to be considered, and not the Quantity of Land on which 'tis sowed; for Things which grow in the Nature of an Herb must be reckoned small Tythes, let the Proportion of Land on which they are sowed be either more or less.

And here it may not be improper to mention the Statute of 29 *Car.* 2. *cap.* 8. which takes Notice of Letters sent by the King to the Bishops, immediately upon his Restoration, directing them upon the renewing of Leases of Rectories and Tythes improper or appropriate to reserve more than the ancient Rent, that it might be paid to the poor Vicars to augment their Vicaridges, which was to continue during the Estate out of which it was granted, and afterwards, and that the Vicars should be adjudged in the Possession thereof to them and their Successors, and should have Remedy to recover such Rents by Distress or Action of Debt.

Such Leases are to be entred in a Parchment-Book, to be kept by the Bishop's Register, which being attested by the Bishop himself in that Book, and that the Augmentation was intended for such use, shall be as a Record, and a Copy thereof proved by Witness, shall be given in Evidence.

Visitation.

THIS is that Office which is performed by the Bishop once in Three Years, or by his Archdeacon every Year, by Visiting the Churches throughout the Diocese, *Ut populus illorum cura commissus salubriter a pastoribus & ordine gubernetur, & quod assiduis & piis Ministrorum officiis Ecclesiarum ipsarum status recte conservetur.*

'Tis the Duty of a Commissary to Summon the Churchwardens and Sidesmen to a Visitation, but he hath no Authority to Summon any other Persons; but if he doth Summon those Persons, and they, refusing to appear, should be excommunicated for this Contempt, a Prohibition would be granted. *Noy 123.*

Two Things are requisite in these Visitations:

1. The Charge.
2. The Enquiry.

The Charge consists of such Things which the Visitor thinks proper to impart to the Clergy; but 'tis usually to put them in Mind of their Duty, and to perswade them to perform it.

The Enquiry did formerly consist in several Articles taken out of the Canons, and the Bishop's Visitation being accounted an Episcopal Synod, there were at that Time certain Persons who attended it, and who were called *Testes Synodales*, or *Furatores Synodi*, and they were to Present those who were negligent in performing religious Offices, or any Irregularities amongst the Clergy, both in respect to their Morals and Behaviour, and likewise all Dilapidations, and generally what they found to be amiss in the Diocese.

The Bishop at first exercised this Jurisdiction alone; it was what was imply'd in his very Office, and this he was to do in every Parish throughout his Diocese once in a Year, there to examine the Minister and the People, which he might do with more ease at that Time, because Parish-Churches were not so numerous then as afterwards.

When this was refused, then Ecclesiastical Persons were to be assembled in a certain Place, and Enquiry was made upon Oath concerning the State of the Clergy, and at this Place they were all bound to appear.

Afterwards, when Bishops came to be Ministers of State, and to attend the Courts of Kings, which began in the *Norman Reigns*, then Archdeacons were vested with this Jurisdiction under the Bishops, and visited in those Years wherein the Bishops did not.

But still the Bishops were to Visit once in Three Years, and, being then the King's Barons and Statesmen, they came with very great Equipage, insomuch that by the Council of *Lateran* their Number was limited according to their Qualities, *viz.* if the Visitor was an Archbishop, he was not to have above 50 Horse in his Retinue; if a Bishop, he was not to exceed 30; if a Cardinal, then 25; if an Archdeacon, he was to have no more than 7, and a Dean but 2; and if they respectively exceeded those Numbers, then no Procuration was due for the Maintenance of the Supernumeraries.

But

But even this was very chargeable to the Parochial Clergy, for the Visitor was to be maintained at their Expence a Day and a Night in every Parish; and therefore it was thought fit to turn that Charge into a certain Sum, which is now called Procurations, and this is paid to Archdeacons in that very Year wherein Bishops visit, for 'tis by some affirmed to be due to them *ratione Officii*; and some say 'tis due to them by Virtue of the Statute of 33 Hen. 8. cap. 5. by which these Duties are made Penfions.

The first of these Opinions is contrary to several Canons, which not only enjoin Personal Visitations, but expressly forbid any Procurations to be paid where the Archdeacon himself did not visit in Person.

But notwithstanding those Canons, Custom hath so far prevailed, that the Archdeacon receives these Fees in the Bishop's Triennials, when they do not visit in Person; but instead of that they hold 2 Chapters about *Easter* and *Michaelmas*, and there, by themselves or their Officials, they formally enquire into the State and Condition of the Church, which Enquiry is now called a Visitation, and for which they are entitled to these Fees.

Having been so long upon the manner of Visitations, I shall proceed now to shew,

1. Who are the *Visitors*.
2. Who may be *visited*.

As to the first, 'tis certain, that, by the Common Law, the Kings and Queens of *England* have Power to visit, to reform, to correct all Disorders in the Church; but generally the Bishop is the *Visitor*, not only of the Churches within his Diocese, but of every Spiritual Hospital; for all Abbies and Priories were formerly visitable by him, if not exempted from his Jurisdiction; and those, which were so exempted before the Dissolution, were by the Statute of 31 H. 8. made subject to his *Visitation*, if they were within his Diocese, or to the Jurisdiction of such Persons whom the King should appoint.

'Tis true, some Alteration was made of this Law, by the Statute of 1 Ph. & M. cap. 8. but by the Act of 1 Eliz. the Power of *Visitation* was restored to the Ordinary.

And because Colleges and other Schools of Learning are generally esteemed Part of the Ecclesiastical Body, therefore I shall give the Reader an Account by whom they are to be visited.

And as to this Matter, they are subject to a double *Visitation* in divers Respects, viz. By the Archbishop *Jure Metropolitico*; this was claimed by Archbishop *Laud*, and decreed in Council, that he had a Right to visit both the Universities, as to their Doctrine, Church-Discipline and Ceremonies, but that he had no Right to meddle with the private Statutes of the Founders.

They are likewise to be visited by the Founders and their Heirs, unless they appoint a special *Visitor*, and then they are subject to his *Visitation* in point of Government;

This appears in that famous Case of *Exeter-College*, wherein the Power and Authority of a *Visitor* was debated, and the Law is now settled as to that Matter, which is thus :

Dr. Bury was Rector of *Exeter-College*, and being deprived by the Bishop of *Exeter*, whom the Founder had appointed to be *Visitor* ; the Question was, whether that Sentence of Deprivation was examinable in the Courts at *Westminster*.

It was the Opinion of Three Judges that it was, because the College is a Temporal Corporation, and the Deprivation of the Head a Temporal Thing.

That that Court of *B. R.* hath a Superintendency over all the Proceedings of *Visitors*, which may appear by many Instances of a higher Nature ; for Commissioners of Sewers, and of Bankrupts, tho' they derive their Power from Acts of Parliament, yet their Proceedings are examinable in that Court.

'Tis true, the *Visitor* is made a Judge by the Founder, and so is an Arbitrator by the Parties ; but his Judgment is usually set aside, and so may the *Visitors* ; for, if his Sentence should be final, then great Part of the Nation in former Times would not have been subject to the Rules and Government of the Common Law, because the rich Men were got into Guilds and Fraternities, the learned Men into Halls and Colleges, the poor Men into Hospitals, and those called Religious into Monasteries and Abbies ; these were all Persons and Places of publick Use and concern to the Nation, and therefore it would be absurd to affirm, that they were subject only to a *Visitor* ; and to be governed by particular Law amongst themselves, exempted from the Power and Authority of the Common Law.

But upon a Writ of Error, brought in the House of Peers, this Judgment was reversed upon these Reasons, *viz.* The Right or Property of the Land which was in the Founder gave him a visitatorial Power in Law, and the Charity given by him must be subject to such Limitations as he thought fit to impose on those who receive it, and therefore, he having appointed a *Visitor*, he is made *Fidei Commissarius*, and his Sentence shall be presumed the Sentence of the Founder himself, which cannot be thought unjust, especially by those who partake of his Charity ; and if not unjust, then not to be examined elsewhere.

And tho' Corporations for publick Government, and which subsist merely by Grants from Kings and Princes, and which never had any particular Founders or Visitors, are subject to the Courts at *Westminster* ; yet Corporations for Charity, founded and endowed by private Persons, are subject to the Rules of the Founders.

But where the Persons to whom the Charity is given are not incorporated, but are only a mere arbitrary Society of Men ; there is no such visitatorial Power, because the Interest of the Revenue is not vested in them ; which shews, that, where they are incorporated, the Right of *Visitation* arises from the Foundation, and so the *Visitor* acts as *Founder*, and by the same Authority, but not merely by the same, for the Founder himself could not give a *Visitor* any such Power to remove a Person out of a Society, so as not to be accountable to any other Court.

There-

Therefore the *Visitor* must be vested with some other Power, besides the Will of the Founder, and that must be such which he hath by Virtue of the Grant from the Crown, by which this College was made a legal Corporation, tho' it was left to the Will of the Founder to appoint what Laws he thought fit to govern it.

As for the Authorities in Law, there is Dr. *Coveney's* Case; who was President of *Magdalen-College*, and deprived by the Bishop of *Winchester*, who was *Visitor*; and the Doctor appealed to the Queen in Chancery, and it was resolved that it did not lie.

'Tis true, there is an Inference made in that Case, viz. because no Appeal did lie, therefore an *ex hoc sequitur*, that the Doctor might have an Affize; but this must be a Mistake, for a Head of a College cannot maintain an Affize, because he hath no sole Seisin.

There can be no Instance given of such an Action, and that Inference was little regarded, for in the very next Year the Archbishop of *Canterbury* nominated a Warden to *Merton-College*, as being Patron upon a Devolution to him: Some of the Fellows opposed the Admission of the Nominee, and thereupon the same Archbishop proceeded against them as *Visitor*, and deprived them, yet no Affize was brought.

About Six Years afterwards, one *Harrison* was chosen President of *Corpus Christi* College, and after he was Elected, one *Cole* was nominated by the Queen; but the Fellows refusing to admit him, the Bishop of *Winchester*, who was their *Visitor*, deprived them, yet no Affize was brought by them.

The Head of the College is only a visible Person of the Body Aggregate, he cannot support a real Action, because he hath no Title to the Rents before a Dividend.

'Tis true, the Power of a *Visitor* is great, and 'tis necessary it should be so, for the Peace and Quiet of the College is more to be regarded than the personal Injury of any private Person.

Therefore the Founders took particular Care to prevent all Law-Suits amongst the Members of those Societies, as knowing them to be destructive to that Quietness which is necessary for their Studies; and 'tis for this Reason, that in some of their Statutes they have provided, that if the Head should be deprived, *nullam actionem, nullum juris remedium canonici vel civilis habeat*.

The Courts at *Westminster* have always denied *Mandatory-Writts* to restore Persons to their Fellowships; they did so in Dr. *Withrington's* Case, who was deprived of his Fellowship of *Christ-College* in *Cambridge*.

So they did in Dr. *Patrick's* Case the very next Year, who was chosen Master of *Queen's-College*, but another was admitted; and tho' it was urged that this was Matter of Free-hold, and that it was a Temporal Thing, yet it had no Remedy.

Anno 22 Car. 2. *Daniel Appleford* was deprived of his Fellowship of *New-College*, but had no Remedy at Law; and the Reason is, because in all these Cases an Appeal lay to the proper *Visitor*, who hath a Jurisdiction, and whose Determinations are final, for otherwise all Suspensions and Deprivations would be examinable in the Courts of Law; and every little Controversy in the College would be brought

brought to *Westminster-Hall*, which would be of great Advantage to Attornies and Lawyers, but none to the Universities.

If we look into the Practice of all civilized Nations, we shall find those Places had always a peculiar Jurisdiction within themselves, by which all Differences arising amongst Scholars were to be decided there, and Exemptions were always allow'd them from the Jurisdiction of Temporal Courts, *ne a studiis avocentur ad lites alibi motas*.

I shall only mention Lay-Hospitals, which are commonly built and endowed to support poor People, and those are visitable by the Patron.

This is any unlawful Possession of a Church, by a Person who hath no manner of Right, and who comes in upon the Presentation of a common Person, when in Truth the Right of the Patronage did lawfully belong to another; but in such Case, if the Clerk should be admitted and instituted, and there is a Plenarty for 6 Months, the true Patron had no other Remedy at Common Law, but to recover his Right by a Writ of Right of Advowson:

And that he could not have, unless he had a Fee-simple; and some of his Ancestors had presented once; for, if he had a Fee-simple by Purchase, yet if he never presented, or if his Ancestors had presented, and he had only an Estate-Tail, he was Remediless at Common Law; but this is prevented by the Statute of *W.2. cap. 5. (7)* so that now, if Tenant in Tail suffer an Usurpation and dies, his Issue may recover in a *Quare Impedit*.

But that Presentation was quite lost *pro hac vice*, because, tho' the Incumbent came in by a wrong Patron, yet his Admission and Institution were legal and judicial Acts which were performed by the Bishop himself, who can never be suppos'd to be injurious to the Patronage of another; and therefore it was held reasonable, that such an Incumbent should be quieted in his Possession, because the Service of God, and instructing the People in his Laws, are more to be regarded than the private Rights of any particular Persons.

And even in the Case of the Queen (a) tho' an Usurpation and Plenarty was no Bar to her Right, yet she could not Present before the Incumbent was removed by a Judgment in a *Quare Impedit*, she is only put out of Possession, so that she must bring that Action; but she is not divested of the Inheritance of the Advowson by any Usurpation whatsoever.

But to return to the Case of a common Person, the Law hath provided a Remedy by Three several Writs against an Usurper, One of the Right, *viz. A Writ of Right of Advowson*, and Two of the Possession, *viz. A Quare Impedit*, and an *Affize of Dareign Presentment*.

I have treated of a *Quare Impedit* under that Title, Affizes of Dareign Presentment are seldom brought, therefore, I shall proceed to shew how an *Advowson* may be lost by Usurpation.

'Tis certain that a *Presentation* may be lost by the Negligence of the Patron, in not Presenting within Six Months after the Avoi-

(7) 2 Inst. 357. (a) 6 Rep. 30. 49. b. 2 Inst. 357.

dance; and 'tis as certain that the Inheritance of an *Advowson* may be lost by Usurpation.

But then such Usurpation must commence,

1. Upon some Presentation which is good in Law.
2. It must be to a void Church.
3. There must be an Admission and Institution upon it.

1. It must commence on a Presentation which is good in Law; and therefore it can never be upon a wrongful Collation; for that cannot make an Usurpation against the true Patron, because such Collation shall be taken only as a Provision for performing Divine Offices during the Vacancy; and therefore, if the Patron presents his Clerk, and the Bishop refuses him, and a *Quare Impedit* is brought, the Bishop can never plead Plenarty for Six Months upon such wrongful Collation in bar to that Action. But tho' a wrongful Collation will not make an Usurpation against the Patron, yet if 'tis made upon him who hath a Right to Collate, and there is a Plenarty for Six Months, that will put him to recover it by a Writ of Right of Advowson. 6 Rep. 50.

It can never commence upon a Presentation which is void in itself; as for Instance, if a Corporation doth mistake their Name in the Presentation; tho' the Clerk is admitted, and the Six Months pass, that will not make an Usurpation, because the Presentation was void. 1 Bullst. 91. 2 Cro. 248.

So if the Presentation is upon a Simoniackal Contract, that will not make an Usurpation upon the right Patron, for the Reason before-mentioned; for in such Case the Presentee was never lawful Incumbent. 2 Rol. Abr. 370. Cro. Lit. 120.

So if a Person is presented to a Donative, and afterwards admitted, instituted and inducted; this will not make an Usurpation, because a Donative is not presentable.

So where the Queen recites in her (b) Presentation a Title which she had not; this will not make an Usurpation, for it is void.

2. The Presentation must be to a void Church, that is, where the Avoidance is such, that the Patron is not bound to present till Notice, but may present, if he please, without Notice; as if the Clerk is deprived for a Crime, the Patron may take Notice of it if he will, and may present another; but he is not bound to do it, because the Church is not absolutely void to him, so that a Lapse may incur till he hath actual Notice of the Deprivation.

So upon a Resignation the Church is void, and the Patron ought to have Notice of it; but if a Stranger presents in such Case, and his Presentation is not void in Law; but his Clerk is inducted on it, and continues in Possession for Six Months; this is an Usurpation, and he cannot be removed, because the *Induction* is a notorious Act, of which the Patron (c) ought to take Notice at his Peril; but if such Resignation had been made upon any Contrivance, and on purpose to defraud the Patron, there 'tis otherwise.

(b) Hob. 302. (c) Rol. Abr. 369. Plito. 3.

There is another Thing to be observed, *viz.* that formerly where an Inheritance of an Advowson was gained by an Usurpation, there must be no manner of Privy between the Usurper and the Person upon whom 'tis made.

First, there must be no Privy (d) in Blood between them; for if an Advowson descends to Coparceners, and one usurps upon the Turn of the other, yet that will not put her out of Possession, but she may present when her Turn comes.

But now the Law is otherwise; for where there are 3 Coparceners (e) and they make Partition to present by Turns, and an Usurpation is made upon the Turn of one, it shall put all out of Possession.

So there was to be no Privy of Estate (f) between them; and therefore, if a Lessor for Years of an Advowson usurps his Lessee, this bars him of that Presentation, but not of the next Turn.

But now, if there are Two Tenants in Common, or Jointenants (g) and one presents alone; this doth not put the other out of Possession, for upon the next Avoidance they may join in the Presentation, and this is by reason of the Privy of Estate which is between them.

But there are some Advowsons which are protected by Law from all manner of Usurpations; as for Instance, those Advowsons of which the Queen is seized in her own Right:

'Tis true, the Law was held otherwise formerly, *viz.* that a double Usurpation * divested the Queen of the Inheritance of her Advowson, and that She should be put to her Writ of Right to recover it, as a common Person is upon a single Usurpation.

But this was denied by my Lord *Anderson* (h) in the Case of the King against the Bishop of *Winton*; for as he cannot be dispossessed of Land, so he cannot be put out of Possession of an Advowson; and he laid it down as a Rule, that of things transitory he may be put out of Possession, but not of an Inheritance:

This Learned Judge was overruled by 3 more; but upon a Writ of Error brought, their Judgment was reversed; for an Usurpation upon the (i) Queen's Advowson, and a Plenary for 6 Months binds Her only as to the Possession, and not as to the Right of the Advowson; so that she may remove the Usurper at any Time by a Judgment in a *Quare Impedit*.

And the Law is now settled (k) that neither 2 or more Usurpations do dispossess the Queen of her Presentation; for as to her the Incumbent is a Trespasser, (l) and as she may remove him whilst living, so she may present after his Death.

So likewise Advowsons, of which Bishops are seized in Right of their Churches, are protected against Usurpations, which may be to the Prejudice of their Successors; tho' such Usurpations do bind du-

(d) 2 Rol. Abr. 369. Plito 3. (e) 2 Vent. 39. (f) 2 Rol. Abr 371: Plito. (g) 2 Rol. Abr. 373. Plito. 12. 1 And. 63. * Dyer 351. (h) 2 Cro. 54. (i) 2 Cro. 123. 1 Brownl. 166. March. 90. 2 Rol. Abr. 371. Plito. 5. (k) Owen 43. 1 And. 81. Moor 338. (l) Moor 421. Cro. Eliz. 519.

ring the Life of the Bishops themselves, yet after their Decease, the Successors may have a *Quare Impedit*, (m) either in the Life-time of the Usurpers, or present to the next Turn after their Death, and this is by Virtue of the Statute 1 *Eli2.* which restrains *Alienations* by Bishops.

And the Law may be the same upon the Statute 13 *Eli2. cap. 10.* as to all other *Ecclesiastical Persons*, who are seized of Advowsons in Right of their Churches, for they are restrained by that Statute from *making Estates* other than for 21 Years, or 3 Lives.

(m) 2 Cro. 673. Jones 46.

FINIS.

L. A. C.

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**ALTERATION OF THE PRAYER BOOK.
THE PRINCESS OF WALES.**

(From the *London Gazette* of last night.)

At the Council Chamber, Whitehall, the 11th day of March, 1863, present—Archbishop of Canterbury, Lord President, the Duke of Somerset, the Duke of Newcastle, Viscount Palmerston, the Bishop of London, Sir George Grey, Bart., Mr. Cardwell, Mr. Lowe.

Whereas, in the Act of Uniformity, which established the Liturgy of the Church of England, provision is made for such alteration in the prayers for the Royal family as from time to time shall become necessary, and be directed by lawful authority, it is, thereupon, this day ordered in Council that in the Morning and Evening Prayers, in the Litany, and in all other parts of the Public Service, as well in the occasional offices as in the Book of Common Prayer, where the Royal family is appointed to be particularly prayed for, the following form and order shall be observed: "Albert Edward, Prince of Wales, the Princess of Wales, and all the Royal family."

And it is further ordered, that no edition of the Common Prayer be from henceforth printed but with this amendment; and that in the meantime, and until copies of such edition may be had, all parsons, vicars, and curates within this realm do (for the preventing of mistakes), with the pen, correct and amend all such prayers in their church books, according to the foregoing direction: and for the better notice hereof, that this order be forthwith printed and published, and sent to the several parishes; and that the right reverend the bishops do take care that obedience be paid to the same accordingly.

ARTHUR HELPS.

At the Council Chamber, Whitehall, the 11th day of March, 1863, present—Archbishop of Canterbury, Lord President, Duke of Somerset, Duke of Newcastle, Viscount Palmerston, Bishop of London, Sir George Grey, Bart., Mr. Cardwell, Mr. Lowe. In pursuance of an act passed in the tenth year of her Majesty Queen Anne, and of another act passed in the thirty-second year of his Majesty King George the Third, wherein provision is made for praying for the Royal family in that part of Great Britain called Scotland; it is hereby ordered in council that henceforth every minister and preacher shall in his respective church, congregation, or assembly, pray in express words, "For her Most Sacred Majesty Queen Victoria, Albert Edward, Prince of Wales, the Princess of Wales, and all the Royal family;" of which all persons concerned are hereby required to take notice and govern themselves accordingly.

ARTHUR HELPS.

